

**COLORADO**  
**JURY INSTRUCTIONS**  

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**CIVIL**


**COLORADO**  
**SUPREME COURT COMMITTEE**  
**ON CIVIL JURY INSTRUCTIONS**

**2021 Edition**

**Volume 2**



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# COLORADO JURY INSTRUCTIONS

## CIVIL

### COLORADO SUPREME COURT COMMITTEE ON CIVIL JURY INSTRUCTIONS

2021 Edition

Volume 2

Chapter 16-Index



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By

The Supreme Court of Colorado for the  
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Volume 2  
ISBN 978-1-539-29352-1

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# Summary of Contents

## Volume 1

Chapter 1	General Instructions Prior to or During Trial and Upon Discharge of Jury.....	13
Chapter 2	Statement of The Case to Be Determined.....	52
Chapter 3	Evidence .....	63
Chapter 4	Jury Deliberations; Verdict Forms .....	90
Chapter 5	General Instructions Relating to Damages .....	126
Chapter 6	Damages for Injuries to Persons or Property.....	150
Chapter 7	Legal Relationships .....	197
Chapter 8	Liability Based on Agency and Respondeat Superior.....	208
Chapter 9	Negligence—General Concepts .....	259
Chapter 10	Wrongful Death .....	421
Chapter 11	Motor Vehicles and Highway Traffic .....	431
Chapter 12	Premises Liability .....	454
Chapter 13	Animals .....	508
Chapter 14	Product Liability.....	519
Chapter 15	Professional Liability .....	647

## Volume 2

Chapter 16	Bailors and Bailees.....	1
Chapter 17	Malicious Prosecution and Abuse of Process .....	10
Chapter 18	Trespass to Land.....	32
Chapter 19	Deceit Based on Fraud .....	44
Chapter 20	Assault and Battery.....	80
Chapter 21	False Imprisonment or Arrest .....	110
Chapter 22	Defamation (Libel and Slander).....	150
Chapter 23	Extreme and Outrageous Conduct—Emotional Distress .....	216
Chapter 24	Intentional Interference with Contractual Obligations .....	230

COLORADO JURY INSTRUCTIONS—CIVIL

Chapter 25	Bad Faith Breach of Insurance Contract.....	248
Chapter 26	Breach of Fiduciary Duty .....	289
Chapter 27	Civil Conspiracy .....	306
Chapter 28	Invasion of Privacy.....	312
Chapter 29	The Colorado Consumer Protection Act.....	339
Chapter 30	Contracts .....	357
Chapter 31	Wrongful Discharge .....	479
Chapter 32	Personal Property .....	518
Chapter 33	Reserved for Future Use .....	536
Chapter 34	Wills .....	537
Chapter 35	Mental Health—Proceedings for Short-Term Treatment or Long-Term Care and Treatment of the Mentally Ill Under C.R.S. Title 27, Article 65 .....	579
Chapter 36	Eminent Domain.....	601
Chapter 37	Reserved for Future Use .....	628
Chapter 38	Reserved for Future Use .....	629
Chapter 39	Reserved for Future Use .....	630
Chapter 40	Children’s Code—Juvenile Delinquency.....	631
Chapter 41	Children’s Code—Dependency and Neglect.....	642

**Table of Laws and Rules**

**Table of Cases**

**Index**

# Table of Contents

## Volume 1

### CHAPTER 1. GENERAL INSTRUCTIONS PRIOR TO OR DURING TRIAL AND UPON DISCHARGE OF JURY

#### A. JURY ORIENTATION

1:1	Introductory Remarks to Jury Panel .....	14
1:2	Explanation to Jury Panel of Voir Dire.....	19
1:3	Remarks to Jury Panel on Voir Dire.....	22
1:4	Jurors' Conduct During Trial—Pre-deliberation Discussions, Prohibition on Communications with Others .....	23
1:5	Jurors' Conduct During Trial—Prohibition on Outside Information and Electronic Communications .....	25
1:6	Pretrial Publicity.....	28
1:7	General Outline of Trial Procedures to Jury.....	29
1:8	Note-Taking by Jurors.....	33
1:9	Juror Notebooks.....	35
1:10	Admonition at Recess.....	37

#### B. INSTRUCTIONS DURING TRIAL

1:11	Evidence Admissible for Particular Purpose Only.....	39
1:12	Stricken Evidence.....	40
1:13	Stipulation or Admission of A Fact.....	41
1:14	Stipulation Concerning Witness's Testimony .....	42
1:15	Directions Upon Authorized Jury View.....	43
1:16	Court's Questions to Witnesses.....	44
1:17	Questions by Jurors of Witnesses .....	45

#### C. DISCHARGE OF JURY

1:18	Mandatory Instruction Upon Discharge.....	46
------	---	----

#### D. OATHS

1:19	Oath on Voir Dire .....	47
1:20	Oath of Jurors.....	48
1:21	Oath or Affirmation of Witnesses .....	49
1:22	Oath of Interpreter .....	50
1:23	Oath of Bailiff on Retirement of Jury .....	51

## CHAPTER 2. STATEMENT OF THE CASE TO BE DETERMINED

2:1 Liability in Issue—No Counterclaim .....	52
2:2 Liability in Issue—Counterclaim .....	54
2:3 Liability in Issue—Third-party Complaint .....	56
2:4 Admitted Liability.....	58
2:5 Directed Verdict as to Liability—Damages Only in Issue—General.....	59
2:6 Directed Verdict as to Liability—Damages Only in Issue—Negligence .....	61

## CHAPTER 3. EVIDENCE

### A. BURDENS OF PROOF

3:1 Burden of Proof and Preponderance of Evidence—Defined.....	64
3:2 Clear and Convincing Evidence—Defined .....	66
3:3 Reasonable Doubt—Defined.....	68
3:4 No Speculation .....	69

### B. PRESUMPTIONS AND PARTICULAR INFERENCES

3:5 Permissible Inference Arising From Rebuttable Presumption .....	70
3:5A Inference Arising From Invocation of Fifth Amendment Privilege.....	73
3:6 Statutory Presumptions That Shift the Burden of Proof.	75
3:7 Constructive Knowledge Based on Duty to Inquire.....	77

### C. WEIGHING OF EVIDENCE

3:8 Evidence in The Case—Stipulations—Judicial Notice— Inferences Permitted and Defined .....	78
3:9 Direct and Indirect (Circumstantial) Evidence—Defined.	80
3:10 Depositions as Evidence.....	81
3:11 Testimony Read From Transcript .....	82
3:12 Preponderance Not Determined by Number of Witnesses.....	83
3:13 Adverse Inference From the Loss or Destruction of Evidence.....	84
3:14 Sympathy—Prejudice.....	85
3:15 Expert Witnesses.....	86
3:16 Determining Credibility of Witnesses.....	87
3:17 Highlighted Exhibits .....	89

**CHAPTER 4. JURY DELIBERATIONS; VERDICT FORMS****A. DELIBERATIONS**

4:1	Summary Closing Instruction .....	91
4:1A	Applying Law to The Evidence.....	92
4:2	Duties Upon Retiring—Selection of Foreperson.....	93
4:2A	Questions During Deliberations .....	95
4:3	Instruction When Jury Appears Deadlocked or Deliberations are Unusually Prolonged .....	96

**B. VERDICTS**

4:4	Verdict Form for Plaintiff—Single Plaintiff and Single Defendant—Actual or Nominal Damages Only .....	98
4:5	Verdict Form for Plaintiff—Single Plaintiff and Single Defendant—Actual and Punitive Damages.....	100
4:6	Verdict Form for Defendant—Single Plaintiff and Single Defendant .....	101
4:7	Verdict Forms for Single Plaintiff and Multiple Defendants, Multiple Plaintiffs and Single Defendant, and Multiple Plaintiffs and Multiple Defendants .....	102
4:8	Verdict Form for Plaintiff on Counterclaim .....	104
4:9	Verdict Form for Defendant on Counterclaim .....	105
4:10	Verdict Form for Third-Party Plaintiff.....	106
4:11	Verdict Form for Third-Party Defendant.....	107
4:12	Verdict Form for Cross-Claimant.....	108
4:13	Verdict Form Against Cross-Claimant.....	109
4:14	Rendering a Sealed Verdict .....	110
4:15	Special Verdict (or Special Interrogatories)—Sample of Mechanics for Submitting .....	111
4:16	Special Verdict (or Special Interrogatories) Form—Sample .....	113
4:17	Reserved for Future Use .....	115
4:18	Reserved for Future Use .....	116
4:19	Reserved for Future Use .....	117
4:20	Model Unified Verdict Form .....	118

**CHAPTER 5. GENERAL INSTRUCTIONS RELATING TO DAMAGES**

5:1	Damages Not to Be Inferred .....	126
5:2	Affirmative Defense—Failure to mitigate .....	127
5:3	Affirmative Defense—Nonuse of Safety Belt.....	132
5:4	Exemplary or Punitive Damages .....	134
5:5	Determining Life Expectancy—Mortality Table .....	145
5:6	Uncertainty as to Amount of Damages .....	146

5:7 Damages for Wrong of Another .....	148
--	-----

## CHAPTER 6. DAMAGES FOR INJURIES TO PERSONS OR PROPERTY

### Introductory Note

#### A. PERSONAL INJURIES

6:1 Personal Injuries—Adults .....	153
6:1A Special Interrogatories to the Jury to Determine the Amount of Damages Awarded for Economic and Noneconomic Losses or Injuries and for Physical Impairment or Disfigurement—Mechanics for Submitting .....	162
6:1B Answers to Special Interrogatories to the Jury Set Forth in Instruction 6:1A .....	165
6:2 Personal Injuries—Minor Child .....	167
6:3 Personal Injuries—Minor Child—Measure of Parents' Damages .....	170
6:4 Personal Injuries—Minor Child—Loss of Earnings—Distinction Between Parents' and Child's Claims .....	173
6:5 Loss of Consortium—Elements of Liability .....	174
6:6 Loss of Consortium—Defined—Damages .....	177
6:7 Personal Injuries—Non-Reduction of Damages—"Thin Skull" Doctrine .....	179
6:8 Aggravation of Preexisting Condition .....	181
6:9 Damages Caused by Unrelated Second Event .....	184
6:10 Effect of Income Tax and Other Economic Factors on Award of Damages .....	187

#### B. DAMAGES FOR LOSS OR DESTRUCTION OF PERSONAL PROPERTY

6:11 Personal Property—Difference in Market Value .....	189
6:12 Personal Property—Cost of Repairs .....	191
6:13 Personal Property—Loss of Use .....	193

#### C. MULTIPLE RECOVERY

6:14 Multiple Recovery Prohibited (When Plaintiff Suing on Alternative but Duplicative Claims for Relief) .....	195
---	-----

## CHAPTER 7. LEGAL RELATIONSHIPS

#### A. MINORS

7:1 Minor Child—Defined—Right to Sue or Defend .....	198
7:2 Emancipation—Defined .....	199

## TABLE OF CONTENTS

### B. PARTNERSHIPS AND JOINT VENTURES

7:3 General Partnership—Defined .....	200
7:4 Joint Venture—Defined .....	202
7:5 Joint Venture in Operation of Vehicle or Other Instrumentality—Defined .....	204
7:6 Joint Venture—Imputing Negligence Among Joint Venturers .....	206

### C. ENTITIES

7:7 Entity Acts Through Individuals .....	207
---	-----

## CHAPTER 8. LIABILITY BASED ON AGENCY AND RESPONDEAT SUPERIOR

### A. DEFINITIONS

8:1 Agency Relationship—Defined .....	210
8:2 Disclosed or Unidentified Principal—Defined .....	213
8:3 Undisclosed Principal—Defined .....	215
8:4 Employer and Employee—Defined .....	217
8:5 Independent Contractor—Definition .....	219
8:6 Loaned Employee .....	222
8:7 Loaned Employee—Determination .....	223
8:8 Scope of Employment of Employee—Defined .....	225
8:9 Scope of Authority of Agent—Defined .....	227
8:9A Actual Authority .....	229
8:9B Express Authority .....	230
8:10 Incidental Authority—Defined .....	231
8:11 Implied Authority—Defined .....	232
8:12 Apparent Authority (Agency by Estoppel)—Definition and Effect .....	234
8:13 Scope of Authority or Employment—Departure .....	236
8:14 Ratification—Definition and Effect .....	237
8:15 Knowledge of Agent Imputable to Principal .....	238
8:16 Termination of Agent's Authority .....	239
8:17 Termination of Agent's Authority—Notice to Third Parties .....	240

### B. LIABILITY ARISING FROM AGENCY

8:18 Principal and Agent—Both Parties Sued—Issue as to Relationship and/or Scope of Authority .....	242
8:19 Principal and Agent—Both Parties Sued—No Issue as to Relationship and Scope of Authority .....	245
8:20 Principal and Agent—Only Principal Sued—Issue as to Relationship and/or Scope of Authority .....	247

8:21	Principal and Agent—Only Principal Sued—No Issue as to Relationship and Scope of Authority .....	249
------	--	-----

## **C. LIABILITY ARISING FROM RESPONDEAT SUPERIOR**

8:22	Employer and Employee—Both Parties Sued—Issue as to Relationship and/or Scope of Employment .....	250
8:23	Employer and Employee—Both Parties Sued—No Issue as to Relationship and Scope of Employment .....	255
8:24	Employer and Employee—Only Employer Sued—Issue as to Relationship and/or Scope of Employment .....	256
8:25	Employer and Employee—Only Employer Sued—FV Issue as to Relationship and Scope of Employment ...	258

## **CHAPTER 9. NEGLIGENCE—GENERAL CONCEPTS**

### **Introductory Note**

### **A. NEGLIGENCE AND DUTY OF CARE**

9:1	Elements of Liability—No Negligence of the Plaintiff....	268
9:2	Negligent Infliction of Emotional Distress—Elements of Liability .....	283
9:3	Negligent Misrepresentation Causing Physical Harm—Elements of Liability .....	286
9:4	Negligent Misrepresentation Causing Financial Loss in A Business Transaction—Elements of Liability .....	289
9:5	Negligent Misrepresentation Causing Financial Loss in A Business Transaction—Unreasonable Reliance—Defined .....	295
9:6	Negligence—Defined (Including Assumption of the Risk and Comparative Negligence Cases) .....	296
9:7	Negligence—Defined—Inherently Dangerous Activities..	300
9:7A	Ultrahazardous Activities Resulting in Strict Liability ..	303
9:8	Reasonable Care—Defined.....	305
9:9	Children—Standard of Care—Negligence (Including Comparative Negligence Cases) .....	306
9:10	Volunteer—Duty of Care.....	308
9:11	SUDDEN EMERGENCY .....	309
9:12	Happening of Accident not Presumptive Negligence .....	310
9:13	Looking But Failing to See as Negligence .....	311
9:14	Negligence Per Se—Violation of Statute or Ordinance...	312
9:15	Conduct in Compliance With Statute or Ordinance and Justifiable Violation of Statute .....	317
9:16	Unknowing Violation of Statute or Ordinance .....	319
9:17	Res Ipsa Loquitur—Permissible Inference Arising From Rebuttable Presumption of Negligence .....	320

**B. CAUSATION**

## Special Note

9:18	Cause When Only One Cause is Alleged—Defined .....	327
9:19	Concurrent Causes (Excluding Designated Nonparty Fault Cases) .....	329
9:20	Cause—Concurrent Causes—Intervening Causes .....	330
9:21	Cause—Foreseeability Limitation .....	333

**C. COMPARATIVE NEGLIGENCE AND COMPARATIVE FAULT**

## Special Note

9:22	Elements of Liability—Comparative Negligence .....	337
9:23	Affirmative Defense—Comparative Negligence of the Plaintiff .....	341
9:24	Affirmative Defense—Negligence or Fault of Designated Nonparty .....	342
9:25	Negligence of Parents Not Imputable to Children .....	344
9:26	Comparative Negligence of Plaintiff—Single Defendant—No Designated Nonparty Involved.....	345
9:26A	Special Verdict Questions—Mechanics for Submitting— Comparative Negligence of the Plaintiff—Single Defendant—No Designated Nonparty .....	347
9:26B	Special Verdict Forms—Comparative Negligence Of the Plaintiff—No Counterclaim—Single Defendant—No Designated Nonparty—Forms A And B.....	350
9:26C	Special Verdict Questions—Mechanics for Submitting— Comparative Negligence of the Plaintiff—No Counterclaim—Single Defendant—No Designated Nonparty (Alternative to Instruction 9:26A).....	355
9:26D	Special Verdict Forms—Comparative Negligence of the Plaintiff—No Counterclaim—Single Defendant—No Designated Nonparty—Forms A and B (Alternative to Instruction 9:26B).....	358
9:27	Comparative Negligence of the Plaintiff—Multiple Defendants—No Designated Nonparty Involved .....	363
9:27A	Special Verdict Questions—Mechanics for Submitting— Comparative Negligence of the Plaintiff—Multiple Defendants—No Designated Nonparty .....	365
9:27B	Special Verdict Forms—Comparative Negligence of the Plaintiff—Multiple Defendants—No Designated Nonparty—Forms A and B .....	368
9:27C	Special Verdict Questions—Mechanics for Submitting— Comparative Negligence of the Plaintiff—Multiple Defendants—No Designated Nonparty (Alternative	

to Instruction 9:27A).....	395
9:27D Special Verdict Forms—Comparative Negligence of the Plaintiff—Multiple Defendants—No Designated Nonparty—Forms A and B (Alternative to Instruction 9:27B).....	376
9:28 Comparative Negligence of Plaintiff—Single Defendant or Multiple Defendants—Designated Nonparty or Nonparties Involved .....	382
9:28A Special Verdict Questions—Mechanics for Submitting—Comparative Negligence of the Plaintiff—Single Defendant or Multiple Defendants—Designated Nonparty or Nonparties Involved .....	386
9:28B Special Verdict Forms—Comparative Negligence of the Plaintiff—Single Defendant or Multiple Defendants—Designated Nonparty or Nonparties Involved—forms A and B .....	389
9:28C Special Verdict Questions—Mechanics for Submitting—Comparative Negligence of the Plaintiff—Single Defendant or Multiple Defendants—Designated Nonparty or Nonparties Involved (Alternative to Instruction 9:28A).....	395
9:28D Special Verdict Forms—Comparative Negligence of The Plaintiff—Single Defendant or Multiple Defendants—Designated Nonparty or Nonparties Involved—Forms A and B (Alternative to Instruction 9:28B).....	398
9:29 Elements—Multiple Defendants or One or More Defendants and One or More Designated Nonparties—No Negligence or Fault of Plaintiff .....	404
9:29A Special Verdict Questions—Mechanics for Submitting—Multiple Defendants or One or More Defendants and One or More Designated Nonparties—No Negligence or Fault of Plaintiff .....	407
9:29B Special Verdict Forms—Multiple Defendants or One or More Defendants and One or More Designated Nonparties—No Negligence or Fault of Plaintiff—Forms A and B .....	410

#### **D. WILLFUL AND WANTON NEGLIGENCE**

9:30 Willful and Wanton Conduct Or Willful and Reckless Disregard—Defined .....	416
---	-----

#### **E. SUBJECTS ON WHICH NO SEPARATE INSTRUCTIONS HAVE BEEN PREPARED**

9:31 Contributory Negligence, Contributory Negligence of (Spouse) (Parent) (Child), and Assumption of Risk ....	418
---	-----

**F. SUBJECTS ON WHICH NO SEPARATE INSTRUCTIONS SHOULD BE GIVEN**

9:32 Rescue Doctrine, Unavoidable Accident, and Last Clear Chance.....	420
--	-----

**CHAPTER 10. WRONGFUL DEATH**

10:1 Contributory Negligence of a Decedent.....	421
10:2 Contributory Negligence of a Plaintiff.....	422
10:3 Damages for Wrongful Death.....	423
10:4 Wrongful Death of Child—Determining Pecuniary Loss .	429

**CHAPTER 11. MOTOR VEHICLES AND HIGHWAY TRAFFIC**

**A. DUTY OF CARE**

11:1 Duty to Maintain Lookout.....	432
11:2 Duty of Care of Driver Having Right of Way.....	433
11:3 Duty of Care of Pedestrian or Bicycle Operator Having Right of Way.....	434
11:4 Pedestrian in Crosswalk.....	435
11:5 Duty of Care of Minor Operating Motor Vehicle.....	436
11:6 Duty of Care of Physically or Mentally Handicapped Driver.....	437
11:7 Duty of Care of Unlicensed Driver.....	438
11:8 Duty of Care as to Speed of Vehicle.....	439
11:9 Right to Assume Others Will Obey the Law.....	440
11:10 Driving on Wrong Side of Road as Negligence.....	441
11:11 Right to Assume That Driver on Wrong Side of Road Will Return.....	442
11:12 Rear-End Collision—Presumption of Negligence.....	443
11:13 Brake or Other Equipment Failure.....	445
11:14 Driving Under the Influence—Defined.....	446

**B. RESERVED FOR FUTURE USE**

**C. VICARIOUS LIABILITY—MOTOR VEHICLES**

11:15 Family Car Doctrine.....	448
11:16 Head of Household—Defined.....	450
11:17 Household or Family—Defined.....	451
11:18 Imputation of Driver's Negligence to Owner or Co-owner—Presumption of Control.....	452

**CHAPTER 12. PREMISES LIABILITY**

Introductory Note

**A. PERSONS INJURED ON THE PREMISES**

12:1	Liability of Owner or Occupant to A Trespasser Injured on Premises—Elements of Liability .....	459
12:2	Liability of Owner or Occupant to a Licensee Injured on Premises—Elements of Liability.....	465
12:3	Liability of Owner or Occupant to an Invitee Injured on Premises—Elements of Liability.....	472
12:4	Liability of Owner or Occupant to Children Injured on Premises—Attractive Nuisance Doctrine—Elements of Liability.....	479
12:5	Attractive Nuisance Doctrine—Child Between 14 and 18—Presumption of Competency .....	483

**B. PERSONS INJURED OFF THE PREMISES**

12:6	Liability of Owner or Occupant to Persons Injured Off the Premises—Elements of Liability .....	484
12:7	Duty of Owner or Occupant to Persons Injured Off the Premises .....	488

**C. LESSOR'S DUTY OF CARE**

12:8	No Implied Warranty of Fitness .....	489
12:9	Lessor's Liability for Injury From Latent Defect.....	490
12:10	Lessor's Liability for Injury When Premises Leased for Public or Semi-Public Use and Were Defective at Time of Lease.....	491
12:11	Lessor's Liability as Affected by Lessor's Promise to Repair Premises .....	492
12:12	Liability of Lessor Who Commences Repair of Premises.....	493

**D. AMUSEMENT PARK DEVICES—SKI LIFTS—  
OPERATOR'S DUTY OF CARE**

12:13	Amusement Devices and Ski Lifts—Duty of Care Where User Lacks Freedom of Movement.....	494
-------	--	-----

**E. LATERAL AND SUBJACENT SUPPORT**

12:14	Landowner's Right to Lateral and Subjacent Support...	495
-------	---	-----

**F. PUBLIC PLACES**

12:15	Colorado Governmental Immunity Act .....	497
12:16	Duty of Care by User of Public Way .....	505
12:17	Negligent Choice of Route .....	506

**G. VIOLATION OF STATUTE OR ORDINANCE**

12:18	Violation of Statute or Ordinance—Evidence of Failure to Exercise Reasonable Care.....	507
-------	--	-----

## TABLE OF CONTENTS

### CHAPTER 13. ANIMALS

13:1 Domestic Animals—Dangerous or Vicious Tendencies— Elements of Liability.....	508
13:2 Wild Animals—Elements of Liability.....	513
13:3 Serious Bodily Injury or Death Resulting From Being Bitten by A Dog—Elements of Liability.....	515
13:4 Serious Bodily Injury—Defined.....	517
13:5 Damages .....	518

### CHAPTER 14. PRODUCT LIABILITY

#### Introductory Note

#### A. STRICT PRODUCT LIABILITY

14:1 Elements of Liability.....	526
14:2 Manufacturer—Defined.....	532
14:3 Defective, Unreasonably Dangerous—Defined .....	534
14:4 Warnings and Instructions .....	537
14:5 Presumptions—Noncompliance With Governmental Standards.....	540
14:5A Presumptions—Compliance With Governmental Standards.....	542
14:5B Presumptions—Ten-Year Use of Product .....	543
14:6 State-of-the-Art.....	544
14:7 Damage Alone Not Proof Product was Defective or Unreasonably Dangerous .....	545

#### B. PRODUCT LIABILITY FOR BREACH OF WARRANTY

14:8 Breach of Express Warranty Under U.C.C.—Elements of Liability .....	546
14:9 Express Warranty—Defined .....	551
14:10 Breach of Implied Warranty of Merchantability— Elements of Liability.....	553
14:11 Implied Warranty of Merchantability—Defined .....	556
14:12 Implied Warranty of Wholesomeness of Food—Defined .	558
14:13 Breach of Implied Warranty of Fitness for a particular Purpose—Elements of Liability.....	559
14:14 Implied Warranty of Fitness for a Particular Purpose—Defined .....	562
14:15 Notice of Breach of Warranty—What Constitutes .....	563
14:16 Implied Warranties—Creation and Exclusion or Modification.....	565

#### C. PRODUCT LIABILITY FOR NEGLIGENCE

14:17 Manufacturer's Liability Based on Negligence— Elements of Liability.....	568
---	-----

14:18	Manufacturer's Duty as to Parts Obtained From Other Sources .....	571
14:19	Manufacturer's/Seller's Duty to Warn .....	573
14:20	Liability For Injury From Food or Beverage in Sealed Container—Elements of Liability .....	575
14:21	Prima Facie Negligence Liability for Injury From Food or Beverage in Sealed Container (Res Ipsa Loquitur) .....	577

## **D. STRICT PRODUCT LIABILITY FOR MISREPRESENTATION**

14:22	Elements of Liability .....	578
14:23	Misrepresentation of Material Fact—Defined .....	581
14:24	Reasonable Reliance—Defined .....	582

## **E. AFFIRMATIVE DEFENSES AND DEFENSE CONSIDERATIONS**

14:25	Affirmative Defense—Unreasonable, Knowing Use of Defective Product or Product Not in Compliance with Warranty .....	583
14:26	Affirmative Defense—Risk of an Unavoidably Unsafe Product .....	585
14:27	Affirmative Defense—Misuse of Product .....	587
14:28	Affirmative Defense—Comparative Fault Based on Unreasonable, Knowing Use of Product Involving Negligently Created Risk, Product not in Compliance with Warranty, or Defective or Misrepresented Product .....	590
14:29	Affirmative Defense—Comparative Fault Based on Negligence .....	592
14:30	Comparative Fault—Elements and Effect—No Counterclaim—Single Defendant .....	594
14:30A	Special Verdict—Mechanics for Submitting—No Counterclaim—Single Defendant .....	596
14:30B	Special Verdict Forms—No Counterclaim—Single Defendant—forms A, B, and C .....	599
14:31	Comparative Fault—Elements and Effect—No Counterclaim—Multiple Defendants .....	605
14:31A	Special Verdict—Mechanics for Submitting—No Counterclaim—Multiple Defendants .....	607
14:31B	Special Verdict Forms—No Counterclaim—Multiple Defendants—Forms A, B, and C .....	610
14:32	Comparative Fault—Elements and Effect—No Counterclaim—Single Defendant—Designated Nonparty or Nonparties Involved .....	618
14:32A	Special Verdict—Mechanics for Submitting—No Counterclaim—Single Defendant—Designated	

## TABLE OF CONTENTS

	Nonparty or Nonparties Involved.....	660
14:32B	Special Verdict Forms—No Counterclaim—Single Defendant—Designated Nonparty or Nonparties Involved—Forms A, B, and C .....	623
14:33	Comparative Fault—Elements and Effect—Multiple Defendants—Designated Nonparty or Nonparties Involved .....	631
14:33A	Special Verdict—Mechanics for Submitting—No Counterclaim—Multiple Defendants—Designated Nonparty or Nonparties Involved.....	633
14:33B	Special Verdict Forms—No Counterclaim—Multiple Defendants—Designated Nonparty or Nonparties Involved—Forms A, B, And C .....	637

## CHAPTER 15. PROFESSIONAL LIABILITY

### I. PHYSICIANS AND PRACTITIONERS OF OTHER HEALING ARTS

#### A. MALPRACTICE

15:1	Elements of Liability .....	649
15:2	Negligence—Nonspecialist—Defined.....	658
15:3	Negligence—Specialist or One Who Has or Claims to Have Special Skill—Defined.....	660
15:4	No Implied Warranty of Successful Outcome .....	662
15:5	Referral of Patient to Another Physician.....	664
15:6	Contributory Negligence of Patient—Defined.....	665

#### B. BATTERY

15:7	Operation or Treatment Without Consent of Patient .....	667
15:8	Affirmative Defense—Consent, Express or Implied .....	669
15:9	Affirmative Defense—Implied Consent Based on Emergency .....	670

#### C. UNINFORMED CONSENT

15:10	Uninformed Consent—Elements of Liability .....	672
15:11	Information Required .....	676
15:12	Substantial Risk—Defined.....	678
15:13	Proof of Negligent Failure to Obtain Informed Consent.....	679

### D. DAMAGES INSTRUCTIONS AND SPECIAL VERDICTS IN ACTIONS AGAINST HEALTH CARE PROFESSIONALS OR HEALTH CARE INSTITUTIONS

15:14	Special Verdict—Mechanics for Submitting—Tort Actions Against Health Care Professionals or	
-------	--	--

Health Care Institutions .....	712
15:15 Special Verdict Forms—Tort Actions Against Health Care Professionals or Health Care Institutions— Forms A and B.....	686
15:16 Determining Present Value of Future Damages .....	694
15:17 Determining Lifelong Future Damages—Shortened Life Expectancy .....	696

## II. ATTORNEYS—MALPRACTICE

15:18 Elements of Liability of Attorneys—Not Involving an Underlying Claim or Case.....	697
15:19 Elements of Liability of Attorneys—Involving an Underlying Matter (Case-Within-a-Case).....	703
15:20 Elements of Liability of Attorneys—Involving an Underlying Matter (Case-Within-a-Case)— Determining Whether Plaintiff Should Have Prevailed in the Underlying Matter.....	706
15:21 Negligence—Attorneys—Defined.....	708
15:22 No Implied Warranty of Successful Outcome.....	710
15:23 Referral of Client to Another Attorney .....	711
15:24 Contributory Negligence of Client—Defined.....	712

## III. OTHER PROFESSIONAL MALPRACTICE (ACCOUNTANTS, ARCHITECTS, ETC.)

15:25 Elements of Liability—Accountants, Architects, Etc....	714
15:26 Negligence—Other Professionals—Defined .....	716
15:27 Causation—Real Estate Brokers—Transactional Malpractice—Defined .....	718
15:28 No Implied Warranty of Successful Outcome—Other Professionals .....	719
15:29 Referral of Client to Another Professional Person .....	720
15:30 Contributory Negligence of Client—Defined.....	721

# Volume 2

## CHAPTER 16. BAILORS AND BAILEES

16:1 Bailment—Bailor—Bailee—Defined .....	1
16:2 Bailor Not Liable to Third Persons for Negligence of Bailee .....	3
16:3 Gratuitous Bailment—Duty of Bailor to Warn Bailee— Definition of Negligence .....	4
16:4 Non-Gratuitous Bailment—Duty of Non-Commercial Bailor to Bailee—Definition of Negligence.....	6
16:5 Duty of Bailee to Bailor .....	7

## TABLE OF CONTENTS

16:6 Failure of Bailee to Return Property or Return it in Undamaged Condition—Presumption of Negligence ..	8
--	---

### CHAPTER 17. MALICIOUS PROSECUTION AND ABUSE OF PROCESS

#### A. MALICIOUS PROSECUTION

17:1 Elements of Liability .....	11
17:2 Probable Cause—Defined .....	15
17:3 Probable Cause Not Dependent on Result of Criminal Case .....	16
17:4 Presence of Malice .....	17
17:5 Proof of Malice .....	18
17:6 Lack of Probable Cause Not to be Inferred From Malice Alone .....	19
17:7 Affirmative Defense—Advice of Attorney .....	20
17:8 Affirmative Defense—Advice of Prosecuting Attorney ....	22
17:9 Actual Damages .....	23

#### B. ABUSE OF PROCESS

17:10 Elements of Liability .....	25
17:11 Actual Damages .....	29
17:12 Ulterior Purpose—Defined .....	31

### CHAPTER 18. TRESPASS TO LAND

18:1 Trespass—Elements of Liability .....	32
18:2 Intentionally—Defined .....	36
18:3 Consent .....	37
18:4 Actual or Nominal Damages .....	38

### CHAPTER 19. DECEIT BASED ON FRAUD

19:1 False Representation—Elements of Liability .....	44
19:2 Nondisclosure or Concealment—Elements of Liability ..	51
19:3 False Representation—Defined .....	55
19:4 Material Fact—Defined .....	56
19:5 Nondisclosure—Duty to Disclose .....	58
19:6 Concealment—Defined .....	61
19:7 False Representation—Reliance—Defined .....	62
19:8 Justifiable Reliance on False Representation—Defined ..	64
19:9 Justifiable Reliance—Nondisclosure or Concealment—Defined .....	65
19:10 Justifiable Reliance—No General Duty to Investigate ..	67
19:11 Reliance After Investigation .....	70
19:12 Statements of Future Intention or Promises as False Representations .....	71

19:13	Statements About the Future as False Representations .....	72
19:14	Statements of Law as False Representations .....	73
19:15	Statements of Opinion as False Representations .....	74
19:16	Affirmative Defense—Waiver by Plaintiff Before Plaintiff's Complete Performance.....	76
19:17	Actual Damages.....	77

## CHAPTER 20. ASSAULT AND BATTERY

### A. ASSAULT

20:1	Elements of Liability .....	81
20:2	Apprehension—Defined .....	84
20:3	Intent to Place Another in Apprehension—Defined .....	85
20:4	Actual or Nominal Damages.....	86

### B. BATTERY

20:5	Elements of Liability .....	89
20:6	Contact—Defined .....	92
20:7	Intent—Defined .....	93
20:8	Transferred Intent .....	94
20:9	Actual or Nominal Damages.....	95

### C. AFFIRMATIVE DEFENSES

20:10	Words Alone Do Not Justify .....	96
20:11	Consent .....	97
20:12	Self-Defense of Person .....	99
20:13	Self-Defense—Force Calculated to Inflict Death or Serious Bodily Injury .....	101
20:14	Defense of Another Person.....	102
20:15	Battery Defenses—Defense of Real Property .....	104
20:16	Battery Defenses—Defense of Personal Property .....	106
20:17	Battery Defenses—Recapture of Personal Property .....	108

## CHAPTER 21. FALSE IMPRISONMENT OR ARREST

### A. LIABILITY

21:1	Elements of Liability .....	111
21:2	Restriction of Freedom of Movement—Defined .....	114
21:3	Intent—Defined .....	117
21:4	Intent to Restrict by Failure to Release .....	118
21:5	Actual or Nominal Damages.....	119

### B. AFFIRMATIVE DEFENSES

21:6	Consent .....	121
------	---------------	-----

## TABLE OF CONTENTS

21:7	Statutory Privilege to Detain for Investigation .....	123
21:8	Common-Law Privilege to Detain for Investigation .....	126
21:9	Privilege to Defend Person or Property .....	128
21:10	Privilege of Any Person to Arrest Without a Warrant ...	130
21:11	Privilege of Peace Officer to Arrest Without a Warrant .	133
21:12	Arrest—Defined .....	137
21:13	Reasonable Grounds for Believing and Probable Cause to Believe—Defined .....	138
21:14	Fresh Pursuit—Defined .....	140
21:15	Privilege to Arrest with a Warrant .....	141
21:16	Indication of Intent to Arrest—When Excused .....	144
21:17	Valid Warrant or Warrant Fair on Its Face—Defined ...	145
21:18	Guilt of Person Arrested .....	147
21:19	Abuse of a Privilege to Arrest .....	148

## CHAPTER 22. DEFAMATION (LIBEL AND SLANDER)

### Introductory Note

22:1	Libel or Slander Per Se—Where the Plaintiff Is a Public Official or Public Person or, If a Private Person, the Statement Pertained to a Matter of Public Interest or General Concern—Elements of Liability .....	158
22:2	Libel or Slander Per Quod—Where the Plaintiff Is a Public Official or Public Person or, If a Private Person, the Statement Pertained to a Matter of Public Interest or General Concern—Elements of Liability .....	167
22:3	Reckless Disregard Defined—Where the Plaintiff Is a Public Official or Public Person or, If a Private Person, the Statement Pertained to a Matter of Public Interest or General Concern .....	171
22:4	Libel or Slander Per Se—In a Private Matter Where Plaintiff Is a Private Person—Elements of Liability .	174
22:5	Libel or Slander Per Quod—In a Private Matter Where Plaintiff Is a Private Person—Elements of Liability .	177
22:6	Incremental Harm .....	180
22:7	Published—Defined .....	181
22:8	Defamatory—Defined .....	182
22:9	About the Plaintiff—Defined .....	184
22:10	Determination of Meaning of Statement—How Understood by Others .....	185
22:11	Determination of Meaning of Statement—Publication to Be Considered as a Whole .....	186
22:12	Determination of Meaning of Statement—Publication to Be Considered in Light of Surrounding	

Circumstances .....	214
22:13 False—Defined .....	188
22:14 Special Damages—Defined .....	190
22:15 Actual Damage—Defined .....	191
22:16 Affirmative Defense—Substantial Truth.....	192
22:17 Affirmative Defense—Absolute Privilege.....	194
22:18 Affirmative Defense—Qualified Privilege—When Lost..	196
22:19 Affirmative Defense—Privilege to Report Official or Public Meeting Proceedings .....	201
22:20 Affirmative Defense—Privilege to Provider of Means of Communication .....	203
22:21 Affirmative Defense—Fair Comment.....	204
22:22 Affirmative Defense—Consent .....	205
22:23 Affirmative Defense—Statute of Limitations .....	207
22:24 Repetition by Third Persons as an Element of Damages .....	209
22:25 Damages—Recovery of .....	210
22:26 Circumstances that Mitigate Damages.....	212
22:27 Exemplary or Punitive Damages.....	214

## **CHAPTER 23. EXTREME AND OUTRAGEOUS CONDUCT—EMOTIONAL DISTRESS**

23:1 Elements of Liability .....	216
23:2 Extreme and Outrageous Conduct—Defined.....	221
23:3 Recklessly or with Intent—Defined .....	224
23:4 Severe Emotional Distress—Defined.....	225
23:5 Exercising Legal Rights in Permissible Manner .....	227
23:6 Actual Damages .....	228

## **CHAPTER 24. INTENTIONAL INTERFERENCE WITH CONTRACTUAL OBLIGATIONS**

24:1 ELEMENTS OF LIABILITY.....	230
24:2 Intentional Conduct—Defined .....	236
24:3 Improper—Defined.....	237
24:4 Interference—Defined .....	239
24:5 Contracts Terminable at Will or Voidable .....	240
24:6 Affirmative Defense—Privilege—When Existent—When LOST.....	242
24:7 Actual or Nominal Damages.....	245

## **CHAPTER 25. BAD FAITH BREACH OF INSURANCE CONTRACT**

25:1 Elements of Liability—Third-Party Claims.....	248
25:2 Elements of Liability—First-Party Common-Law Claims .....	256

## TABLE OF CONTENTS

25:3	Unreasonable Conduct/Unreasonable Position— Common-Law Claims—Defined.....	266
25:4	Elements of Liability—First-Party Statutory Claims....	269
25:5	Unreasonable Delay or Denial .....	272
25:6	Unreasonable Conduct/Unreasonable Position— Statutory Violations—Defined .....	274
25:7	Reckless Disregard—Defined .....	276
25:8	Duty of Good Faith and Fair Dealing .....	277
25:9	Actual Damages—Common-Law Claims .....	280
25:10	Benefit Amount—First-Party Statutory Claims .....	284
25:11	Punitive Damages .....	287

### CHAPTER 26. BREACH OF FIDUCIARY DUTY

26:1	Elements of Liability .....	289
26:2	Fiduciary Relationship—Defined.....	294
26:3	Fiduciary Relationship Arising out of a Confidential Relationship.....	299
26:4	Confidential Relationship—Defined.....	302
26:5	Actual Damages.....	303

### CHAPTER 27. CIVIL CONSPIRACY

27:1	Elements of Liability .....	306
27:2	Unlawful Means—Defined .....	310
27:3	Unlawful Goal—Defined .....	311

### CHAPTER 28. INVASION OF PRIVACY

28:1	Invasion of Privacy by Intrusion—Elements of Liability .....	312
28:2	Intrusion—Very Offensive to a Reasonable Person—Defined .....	317
28:3	Intentional Intrusion—Defined .....	318
28:4	Invasion of Privacy by Appropriation—Elements of Liability .....	319
28:5	Invasion of Privacy by Public Disclosure of Private Facts—Elements of Liability.....	322
28:6	Public Statement or Disclosure—Defined .....	327
28:7	About the Plaintiff—Defined .....	328
28:8	Private Facts—Defined.....	329
28:9	Public Disclosure of Private Facts—Very Offensive to a Reasonable Person—Defined.....	330
28:10	Invasion of Privacy by Publicity Placing Plaintiff in a False Light.....	331
28:11	Invasion of Privacy—Affirmative Defense—Privilege....	332
28:12	Invasion of Privacy—Affirmative Defense—Statute of Limitations.....	333

28:13	Invasion of Privacy—Affirmative Defense—Consent ....	334
28:14	Invasion of Privacy—Damages .....	336
28:15	Invasion of Privacy—Exemplary or Punitive Damages..	338

## CHAPTER 29. THE COLORADO CONSUMER PROTECTION ACT

### Introductory Note

29:1	Elements of Liability .....	343
29:2	Deceptive Trade Practices—Defined .....	347
29:3	False Representation/Misrepresentation—Defined .....	349
29:4	Significant Impact on the Public—Defined .....	350
29:5	Actual Damages.....	353
29:6	Treble Damages.....	355

## CHAPTER 30. CONTRACTS

### Introductory Note

### A. CONTRACT FORMATION

30:1	Contract Formation—In Dispute.....	361
30:2	Contract Formation—Need Not Be in Writing.....	363
30:3	Contract Formation—Offer .....	364
30:4	Contract Formation—Revocation of Offer .....	365
30:5	Contract Formation—Counteroffer.....	366
30:6	Contract Formation—Acceptance .....	367
30:7	Contract Formation—Consideration .....	368
30:8	Contract Formation—Modification .....	371
30:9	CONTRACT FORMATION—THIRD-PARTY BENEFICIARY .....	373

### B. CONTRACT PERFORMANCE

30:10	Contract Performance—Breach of Contract—Elements of Liability .....	375
30:11	Contract Performance—Breach of Contract Defined.....	380
30:12	Contract Performance—Substantial Performance .....	382
30:13	Contract Performance—Anticipatory Breach .....	384
30:14	Contract Performance—Time of Performance .....	386
30:15	Contract Performance—Conditions Precedent.....	387
30:16	Contract Performance—Implied Duty of Good Faith and Fair Dealing—Non-Insurance Contract .....	389
30:17	Contract Performance—Assignment.....	393

### C. DEFENSES

### Introductory Note

## TABLE OF CONTENTS

30:18	Defense—Fraud in the Inducement .....	400
30:19	Defense—Undue Influence.....	404
30:20	Defense—Duress.....	405
30:21	Defense—Minority.....	407
30:22	Defense—Mental Incapacity.....	408
30:23	Defense—Impossibility of Performance .....	409
30:24	Defense—Inducing a Breach by Words or Conduct .....	412
30:25	Defense—Waiver.....	413
30:26	Defense—Statute of Limitations .....	415
30:27	Defense—Cancellation by Agreement .....	417
30:28	Defense—Accord and Satisfaction (Later Contract) .....	419
30:29	Defense—Novation .....	422

### D. CONTRACT INTERPRETATION

#### Introductory Note

30:30	Contract Interpretation—Disputed Term .....	427
30:31	Contract Interpretation—Parties' Intent.....	428
30:32	Contract Interpretation—Contract as a Whole.....	430
30:33	Contract Interpretation—Ordinary Meaning.....	431
30:34	Contract Interpretation—Use of Technical Words in a Contract.....	432
30:35	Contract Interpretation—Construction Against Drafter.....	434
30:36	Contract Interpretation—Specific and General Clauses.	435

### E. DAMAGES

#### Introductory Note

30:37	Damages—Introduction .....	440
30:38	Damages—General .....	442
30:39	Damages—Special .....	444
30:40	Damages—Liquidated.....	448
30:41	Damages—Nominal .....	451
30:42	Damages—Purchaser's for Breach of Land Purchase Contract.....	452
30:43	Damages—Seller's for Breach of Land Purchase Contract.....	453
30:44	Damages—Employer's for Employee's Breach of Personal Service Contract.....	454
30:45	Damages—Builder's for Breach of Construction Contract by Owner Prior to Completion .....	455
30:46	Damages—Builder's for Substantial Though Not Complete Performance of Construction Contract .....	457
30:47	Definition—Contract Price Agreed Upon.....	459

30:48	Damages—Builder’s for Owner’s Partial Breach— Failure to Make Installment Payment.....	460
30:49	Damages—Owner’s for Breach of Construction Contract by Builder .....	461
30:50	Damages—Owner’s for Delay in Completion of Construction Contract .....	463
30:51	Damages—Broker’s for Breach of Real Estate Commission Contract .....	464
30:52	Damages—Owner’s for Wrongful Deprivation of Use of a Chattel .....	465
30:53	Damages—Owner’s for Breach of a Covenant Against Encumbrances .....	466

## **F. PARTICULAR CONTRACTS**

30:54	Claim—Building Contractor’s Breach of Implied Warranty—Elements of Liability .....	467
30:55	Definition—Building Contractor’s Implied Warranties ..	471
30:56	Claim—Real Estate Commission—Elements of Liability .....	473

## **CHAPTER 31. WRONGFUL DISCHARGE**

### **A. BREACH OF CONTRACT CLAIMS**

31:1	Breach of Employment Contract for a Definite Period of Time—Elements of Liability .....	480
31:2	Employment Contract Providing for Fixed Term Salary—Cautionary Instruction .....	483
31:3	Breach of Employment Contract for an Indefinite Period of Time Requiring Good or Just Cause for Termination—Elements of Liability .....	484
31:4	Breach of Implied Contract Based on Violation of Employer’s Termination Policies or Procedures— Elements of Liability.....	486
31:5	At-Will Employment—Defined .....	492
31:6	Good or Just Cause—Defined .....	495
31:7	General Damages for Wrongful Discharge—Breach of Contract Claim .....	497
31:8	Mitigation of Damages for Wrongful Discharge .....	500
31:9	Constructive Discharge—Defined .....	503
31:10	Constructive (Implied) Discharge .....	504
31:11	Affirmative Defense to Contract Claim—After-Acquired Evidence of Fraud or Other Misconduct.....	505

### **B. TORT CLAIMS**

31:12	Tort Claim for Wrongful Discharge Based on Violations of Public Policy—Employer’s Retaliation Against an
-------	---

## TABLE OF CONTENTS

	Employee for Refusal to Comply with Employer's Improper Directive—Elements of Liability .....	533
31:13	Tort Claim for Wrongful Discharge Based on Violations of Public Policy—Employer's Retaliation Against an Employee for Exercising a Right or Performing a Public Duty—Elements of Liability .....	511
31:14	Advisory Instruction on Wrongful Discharge in Violation of Public Policy .....	513
31:15	Damages for Wrongful Discharge—Tort Claim .....	514
31:16	Affirmative Defense to Damages for Public-Policy Discharge Claim—After-Acquired Evidence of Fraud or Other Misconduct .....	516

## CHAPTER 32. PERSONAL PROPERTY

### A. CONVERSION

32:1	Elements of Liability .....	519
32:2	Intentional and Substantial Interference—Defined .....	523
32:3	Damages .....	526

### B. CIVIL THEFT

32:4	Elements of Liability .....	528
32:5	Intentional and Knowingly—Defined .....	532
32:6	Damages—Actual .....	533
32:7	Damages—Statutory .....	535

## CHAPTER 33. RESERVED FOR FUTURE USE

## CHAPTER 34. WILLS

34:1	WILL CONTEST—STATEMENT OF THE CASE .....	537
34:2	Elements of Proof of Properly Executed, Signed, and Witnessed or Acknowledged Will—All Wills Except Self-Proved and Holographic .....	540
34:3	Conscious Presence—Defined .....	545
34:4	Witness Having an Interest Under the Will .....	546
34:5	Elements of Proof of Properly Executed Will—Self- Proved Will .....	547
34:6	Elements of Proof of Properly Executed Will— Holographic Will .....	550
34:7	Testamentary Intent—Defined .....	555
34:8	Revocation by Burning, Tearing, Cancelling, Obliterating, or Destroying—Defined .....	557
34:9	Presumption of Revocation of Lost Will or of Will or Part(s) of Will Found Burned, Torn, Cancelled, Obliterated, or Destroyed .....	560

34:10	Burden of Proof on Issues of Sound Mind and Memory (Testamentary Capacity) and Undue Influence .....	562
34:11	Testamentary Capacity and Sound Mind—Defined .....	563
34:12	Insane Delusion—Defined .....	565
34:13	Effect of Attestation of Will by Witnesses.....	566
34:14	Undue Influence—Defined.....	567
34:15	Factors to be Considered in Determining Undue Influence .....	568
34:16	Undue Influence—Presumption When Beneficiary in a Confidential or Fiduciary Relationship .....	570
34:17	Undue Influence—Permissible Inference When Presumption of Undue Influence Is Rebutted.....	572
34:18	Confidential Relationship—Defined .....	574
34:19	Fiduciary Relationship—Defined.....	576
34:20	Verdict Form for Proponent .....	577
34:21	Verdict Form for Contestant.....	578

## **CHAPTER 35. MENTAL HEALTH—PROCEEDINGS FOR SHORT-TERM TREATMENT OR LONG-TERM CARE AND TREATMENT OF THE MENTALLY ILL UNDER C.R.S. TITLE 27, ARTICLE 65**

35:1	Statement of the Case and Mechanics for Submitting Special Verdict—Short-Term Treatment .....	579
35:2	Statement of the Case and Mechanics for Submitting Special Verdict—Long-Term Care and Treatment .....	585
35:3	Person with a Mental Illness or Mental Health Disorder—Defined .....	590
35:4	Gravely Disabled—Defined .....	591
35:5	Danger to Self or Others—Defined.....	593
35:6	Expert Witness—Court-Appointed Professional Person ..	594
35:7	Special Verdict Form—Short-Term Treatment.....	595
35:8	Special Verdict Form—Long-Term Care and Treatment..	598

## **CHAPTER 36. EMINENT DOMAIN**

36:1	Instruction to Commissioners as to Duties .....	601
36:2	Burden of Proof as to Issues.....	605
36:3	Ascertainment of Value of Property Taken .....	608
36:4	Ascertainment of Damages and Specific Benefits to Residue .....	610
36:5	Ascertainment of Damages to Residue—Limitations....	614
36:6	Ascertainment of Market Value, Damages, or Specific Benefits—Most Advantageous Uses.....	616
36:7	Approaches to Valuation .....	618
36:8	Sales of Comparable Properties.....	620
36:9	Cost Approach.....	623

## TABLE OF CONTENTS

36:10	Income Approach.....	624
36:11	Report of Commissioners or Verdict Form .....	626

### **CHAPTER 37. RESERVED FOR FUTURE USE**

### **CHAPTER 38. RESERVED FOR FUTURE USE**

### **CHAPTER 39. RESERVED FOR FUTURE USE**

### **CHAPTER 40. CHILDREN'S CODE—JUVENILE DELINQUENCY**

40:1	Introductory Remarks to Jury Panel .....	633
40:2	General Outline of Trial Procedures to Jury .....	638
40:3	Summary Closing Instruction .....	641

### **CHAPTER 41. CHILDREN'S CODE—DEPENDENCY AND NEGLECT**

41:1	Introductory Remarks to Jury Panel .....	642
41:2	General Outline of Trial Procedures to Jury .....	649
41:3	Explanation of Dependency and Neglect Proceedings ...	653
41:4	Statement of the Case and Requirements for Establishing Child Dependent and Neglected .....	654
41:5	Adjudication of No Fault.....	656
41:6	Abandonment—Defined .....	657
41:7	Proper Parental Care—Defined .....	658
41:8	Mistreatment or Abuse—Defined .....	660
41:9	Mistreatment or Abuse—Includes Emotional Abuse.....	661
41:10	Environment Injurious to Child's Welfare—Defined.....	662
41:11	Treatment of Other Child or Children .....	663
41:12	Custody Not Required.....	664
41:13	Run Away From Home—Defined.....	665
41:14	Dependent and Neglected Because of Pattern of Habitual Abuse—Elements.....	666
41:15	Pattern of Habitual Abuse—Defined .....	667
41:16	Prospective Harm.....	668
41:17	Special Verdict—Mechanics for Submitting.....	669
41:18	Special Verdict Form .....	671
41:19	Use of Present Tense—Dependency and Neglect.....	674

### **Table of Laws and Rules**

### **Table of Cases**

### **Index**



## CHAPTER 16. BAILORS AND BAILEES

- 16:1 Bailment—Bailor—Bailee—Defined
- 16:2 Bailor Not Liable to Third Persons for Negligence of Bailee
- 16:3 Gratuitous Bailment—Duty of Bailor to Warn Bailee—  
Definition of Negligence
- 16:4 Non-Gratuitous Bailment—Duty of Non-Commercial Bailor  
to Bailee—Definition of Negligence
- 16:5 Duty of Bailee to Bailor
- 16:6 Failure of Bailee to Return Property or Return it in  
Undamaged Condition—Presumption of Negligence

### 16:1 BAILMENT—BAILOR—BAILEE—DEFINED

A bailment is a delivery of personal property by one person to another for a specific purpose with the understanding that the property is to be returned when the purpose is accomplished.

A bailor is the person who delivers the property. A bailee is the person who receives it.

#### Notes on Use

A “constructive” bailment may arise when one engages another to perform some service with respect to one’s personal property and then leaves the property with the other without any instructions as to its disposition. **Montano v. Land Title Guar. Co.**, 778 P.2d 328 (Colo. App. 1989). It may also arise when there is no direct agreement between the parties, but the transaction is for their mutual benefit. **Christensen v. Hoover**, 643 P.2d 525 (Colo. 1982) (constructive bailment for hire when landlord hired moving company to move tenant’s property). When supported by sufficient evidence, this “constructive bailment” definition should be included either in addition to, or as an alternative to, the definition set out in the first paragraph, depending on the evidence in the case. Such other modifications should also be made in the second paragraph as may be necessary.

#### Source and Authority

1. This instruction is supported by **Mayer v. Sampson**, 157 Colo. 278, 402 P.2d 185 (1965). *See also* **Christensen**, 643 P.2d at 528-29; **Foster v. Bd. of Governors**, 2014 COA 18, ¶ 16, 342 P.3d 497; **Montoya v. Connolly’s Towing, Inc.**, 216 P.3d 98 (Colo. App. 2008); **Passa-**

**mano v. Travelers Indem. Co.**, 835 P.2d 514 (Colo. App. 1991), *rev'd on other grounds*, 882 P.2d 1312 (Colo. 1994).

2. In some circumstances, a bailment may exist even without specific evidence of a “special purpose.” See **In re Marriage of Amich**, 192 P.3d 422 (Colo. App. 2007) (that wife left jewelry in home occupied solely by husband was adequate evidence to support trial court finding of bailment).

## 16:2 BAILOR NOT LIABLE TO THIRD PERSONS FOR NEGLIGENCE OF BAILEE

**A bailor is not legally responsible to third persons for injuries or damages caused by any negligent use of the personal property by the bailee.**

### Notes on Use

1. This instruction is not applicable when the bailor has been personally negligent in making the bailment, for example, lending his or her car to a person who he or she knows is intoxicated or is an incompetent driver. **Baker v. Bratrsovsky**, 689 P.2d 722 (Colo. App. 1984) (recognizing the doctrine of negligent entrustment, but finding it inapplicable to the facts of the case). Nor is this instruction applicable when there is some other relationship between the parties that might permit the negligence of the bailee to be imputable vicariously to the bailor. *See, e.g.*, Chapter 8 and Chapter 11, Part C.

2. A bailor may be liable to third persons for injuries proximately caused by a failure to perform properly the duties stated in Instructions 16:3 and 16:4.

### Source and Authority

This instruction is supported by **Otoupalik v. Phelps**, 73 Colo. 433, 216 P. 541 (1923). *See also* **Graham v. Shilling**, 133 Colo. 5, 291 P.2d 396 (1955); **Greenwood v. Kier**, 125 Colo. 333, 243 P.2d 417 (1952); **Montoya v. Connolly's Towing**, 216 P.3d 98 (Colo. App. 2008).

### **16:3 GRATUITOUS BAILMENT—DUTY OF BAILOR TO WARN BAILEE—DEFINITION OF NEGLIGENCE**

A bailor who provides an item of personal property to another without (payment) (or) (receiving anything in return) is negligent if:

1. The bailor knows of a defect or condition that makes an item unsafe for its intended or reasonably expected uses, or knows other facts indicating that the defect or condition probably exists;

2. A reasonably careful person under the same or similar circumstances would warn the bailee of the defect or condition; and

3. The bailor fails to give such a warning to the bailee.

However, a bailor who provides an item of personal property to another without (payment) (or) (receiving anything in return) is not required to inspect the item to see that it is free from defects or conditions that make it unsafe.

#### **Notes on Use**

1. Use whichever parenthesized words are appropriate.
2. When otherwise appropriate, this instruction should be used for the definition of “negligence,” rather than Instruction 9:6.
3. Whenever this instruction is given, Instruction 16:1, defining “bailor” and “bailee,” should also be given.
4. This instruction should be used only in cases in which the claim for relief is based on negligence.

#### **Source and Authority**

There appear to be no Colorado decisions concerning the subject matter of this instruction. There is support for this instruction, however, from other jurisdictions. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 104 (5th ed. 1984); *see also* RESTATEMENT (SECOND)

OF TORTS § 405 (1965).

5

## 16:4 NON-GRATUITOUS BAILMENT—DUTY OF NON-COMMERCIAL BAILOR TO BAILEE—DEFINITION OF NEGLIGENCE

A bailor who provides an item of personal property to another (for payment) (or) (for something in return) is negligent if the bailor fails to do what a reasonably careful person would do under the same or similar circumstances to make the item reasonably safe for its intended or reasonably expected uses. This obligation to make the item reasonably safe may include:

1. Repairing or giving warning of any known defects or conditions; and
2. Inspecting the item(s) and repairing or giving warning of any defects or conditions that could be discovered by a reasonable inspection.

### Notes on Use

1. The Notes on Use to Instruction 16:3 are also applicable to this instruction.

2. When otherwise appropriate, this instruction should be used for the definition of “negligence” rather than Instruction 9:6.

3. This instruction applies to bailors who are not regularly engaged in leasing or renting personal property on a commercial basis. In the latter case, the bailor may be strictly liable in contract (implied warranty) or tort for physical injuries caused by a defect in the leased property. See generally Allan E. Korpela, Annotation, *Products Liability: Application of Strict Liability in Tort Doctrine to Lessor of Personal Property*, 52 A.L.R.3d 121 (1973). In such cases, instructions similar to those in Chapter 14, Parts B and C, dealing with comparable cases involving sellers of personal property, may be more appropriate than this instruction.

### Source and Authority

There appear to be no Colorado cases concerning the subject matter of this instruction. For authority from other jurisdictions, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 104 (5th ed. 1984). See also RESTATEMENT (SECOND) OF TORTS §§ 407-408 (1965).

## 16:5 DUTY OF BAILEE TO BAILOR

**A bailee must exercise reasonable care to protect the property of the bailor.**

### Notes on Use

1. Whenever this instruction is given, Instructions 16:1, defining “bailor” and “bailee,” 9:8, defining “reasonable care,” and 9:6, defining “negligence,” must also be given.

2. This instruction applies to gratuitous bailments made for the benefit of the bailor. A gratuitous bailee is liable to the owner for damage caused by simple negligence. **Christensen v. Hoover**, 643 P.2d 525 (Colo. 1982). It also applies to bailments made for the mutual benefit of the bailor and bailee, such as a bailment for hire. In the latter case, a bailor is also entitled to a presumption that, if the goods are not returned by the bailee, or are returned in a damaged condition, the loss or damage is presumed to have been caused by the negligence of the bailee. *Id.* at 525. For the instruction setting out this presumption, see Instruction 16:6.

3. Where the bailment is for the sole benefit of the bailee, a higher standard of care may be required of the bailee. *See Christensen*, 643 P.2d at 529 n.2 (describing the three categories of bailments). In such cases, this instruction must be appropriately modified.

### Source and Authority

1. This instruction is supported by **Christensen**, 643 P.2d at 529. *See also In re Marriage of Amich*, 192 P.3d 422 (Colo. App. 2007); **Motor Crane Serv. Co. v. Barker Constr. Co.**, 650 P.2d 1329 (Colo. App. 1982).

2. The negligent misdelivery of bailed property constitutes a conversion of the property for which a plaintiff may be entitled to recover purely economic damages. *See Montano v. Land Title Guar. Co.*, 778 P.2d 328 (Colo. App. 1989).

3. A bailee may be liable to third persons for injury caused by the bailed property on other than a bailment theory. *See Montoya v. Connolly's Towing*, 216 P.3d 98 (Colo. App. 2008) (tow company/bailee had duty to third person separate and distinct from duties arising out of bailment); *see also Foster v. Bd. of Governors*, 2014 COA 18, ¶ 20, 342 P.3d 797, 503 (“Where goods have been damaged or destroyed while in the possession of a bailee, the bailor may bring a contract claim or may bring a tort claim (for negligence or, perhaps, for conversion).”).

**16:6 FAILURE OF BAILEE TO RETURN  
PROPERTY OR RETURN IT IN  
UNDAMAGED CONDITION—  
PRESUMPTION OF NEGLIGENCE**

*Committee's Note: This instruction appears to be inconsistent with Chapman v. Harner, 2014 CO 78, 339 P.3d 519, and Krueger v. Ary, 205 P.3d 1150 (Colo. 2009). In those cases the Supreme Court held that a rebuttable presumption "shifts the burden of going forward to the party against whom it is raised." Krueger, 250 P.3d at 1154. If the presumption applies and is not rebutted by legally sufficient evidence, then the presumed fact is established as a matter of law. Id. at 1156. If the presumption applies and is rebutted by legally sufficient evidence, the presumption is destroyed and leaves only a permissible inference of the presumed fact. Chapman, ¶ 25; Krueger, 205 P.3d at 1154, 1156. In neither scenario is the jury instructed about the presumption. See Instruction 3:5 and its Notes on Use.*

*However, these two cases address only: (a) the presumption of negligence arising from res ipsa loquitur (Chapman) and (b) the presumption of undue influence when a beneficiary of a will is in a fiduciary or confidential relationship with the testator (Krueger). The Supreme Court has not yet considered whether to apply these holdings beyond the specific presumptions at issue in those two cases.*

**When a bailee accepts delivery of property and (fails to return it) (or) (returns it in a damaged condition), the law presumes (, and you must find,) that the bailee was negligent in (losing) (or) (damaging) it.**

**Notes on Use**

1. As explained and illustrated in the Notes on Use to Instruction 3:5, this instruction, when otherwise applicable, may be used as the second paragraph of Instruction 3:5.

2. Use whichever parenthetical words and phrases are appropriate.

In particular, the phrase “and you must find” must be included if this instruction is being used as the second paragraph of Version 1 of Instruction 3:5, but omitted if this instruction is otherwise appropriately being used as the second paragraph of Version 2 of Instruction 3:5. *See In re Marriage of Amich*, 192 P.3d 422 (Colo. App. 2007) (husband’s failure to return wife’s property created only a presumption, not proof, of negligence).

3. This instruction applies to bailments made for the mutual benefit of the bailor and bailee, e.g., a bailment for hire, *see Foster v. Bd. of Governors*, 2014 COA 18, ¶ 19, 342 P.3d 497, as well as to bailments made for only the benefit of the bailee. It does not apply to bailments made only for the benefit of the bailor. *Christensen v. Hoover*, 643 P.2d 525 (Colo. 1982); *Motor Crane Serv. Co. v. Barker Constr. Co.*, 650 P.2d 1329 (Colo. App. 1982).

4. This instruction should be appropriately modified when the bailee became a bailee other than by accepting delivery of the property, e.g., by assuming possession and control. *See Christensen*, 643 P.2d at 529 (discussing “constructive” bailments created by operation of law).

5. This instruction is not applicable to a claim for conversion of bailed property, but only to a claim for negligence where the conditions set forth in the instruction are established. *Underwood v. Dillon Cos.*, 936 P.2d 612 (Colo. App. 1997).

6. This instruction applies to bailments that may exist between spouses with respect to their separate property. *In re Marriage of Amich*, 192 P.3d at 426-27.

### Source and Authority

This instruction is supported by *Christensen*, 643 P.2d at 528-30; *Foster*, 2014 COA 18, ¶ 19; and *Motor Crane Service Co.*, 650 P.2d at 1330-31.

# **CHAPTER 17. MALICIOUS PROSECUTION AND ABUSE OF PROCESS**

## **A. MALICIOUS PROSECUTION**

- 17:1 Elements of Liability
- 17:2 Probable Cause—Defined
- 17:3 Probable Cause Not Dependent on Result of Criminal Case
- 17:4 Presence of Malice
- 17:5 Proof of Malice
- 17:6 Lack of Probable Cause Not to be Inferred From Malice Alone
- 17:7 Affirmative Defense—Advice of Attorney
- 17:8 Affirmative Defense—Advice of Prosecuting Attorney
- 17:9 Actual Damages

## **B. ABUSE OF PROCESS**

- 17:10 Elements of Liability
- 17:11 Actual Damages
- 17:12 Ulterior Purpose—Defined

## A. MALICIOUS PROSECUTION

### 17:1 ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of malicious prosecution, you must find that all of the following have been proved by a preponderance of the evidence:

1. A criminal case was brought against the plaintiff;
2. The criminal case was brought as a result of (an) oral or written statement(s) made by the defendant;
3. The criminal case ended in favor of the plaintiff;
4. The defendant's statement(s) against the plaintiff (was) (were) made without probable cause;
5. The defendant's statement(s) against the plaintiff (was) (were) motivated by malice towards the plaintiff; and
6. As a result of the criminal case, the plaintiff had damages.

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been

proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. Because criminal cases are more frequently the basis for malicious prosecution claims, this instruction and the remaining instructions in this Part A have been drafted for use in malicious prosecution actions arising out of criminal, rather than civil, cases. The Colorado Supreme Court has recognized, however, that a malicious prosecution action may be based on a prior civil action, implying that the elements of liability are the same. **Hewitt v. Rice**, 154 P.3d 408 (Colo. 2007) (citing this instruction with approval and holding that plaintiff's claim for malicious prosecution based on filing notice of lis pendens required showing that action underlying notice of lis pendens was terminated in favor of plaintiff); *see also* **Thompson v. Md. Cas. Co.**, 84 P.3d 496 (Colo. 2004); **Westfield Dev. Co. v. Rifle Inv. Assocs.**, 786 P.2d 1112 (Colo. 1990) (filing of lis pendens in civil action may be actionable as malicious prosecution); **Slee v. Simpson**, 91 Colo. 461, 15 P.2d 1084 (1932); **Waskel v. Guar. Nat'l Corp.**, 23 P.3d 1214 (Colo. App. 2000); **Walford v. Blinder, Robinson & Co.**, 793 P.2d 620 (Colo. App. 1990) (judicially enforceable arbitration proceedings may form basis for malicious prosecution action). In such a case, this instruction (and, when necessary, any of the remaining instructions in this Part A) must be appropriately modified. For other forms of abuse of process, the instructions in Part B of this chapter should be used rather than this instruction.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see Notes on Use to Instruction 4:20.

3. Omit any numbered paragraphs, the facts of which are not in dispute.

4. In appropriate cases, the language in numbered paragraph 4 should read: "If the complaint was filed with probable cause, the defendant continued to prosecute the criminal action after (he) (she) no longer had probable cause to believe the plaintiff guilty."

5. If the defendant has put no affirmative defense in issue or there is insufficient evidence to support a defense, the last two paragraphs should be omitted.

6. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

7. Other appropriate instructions defining the terms used in this instruction, such as Instruction 17:2, defining “probable cause,” must also be given with this instruction.

### Source and Authority

1. This instruction is supported by **Montgomery Ward & Co. v. Pherson**, 129 Colo. 502, 272 P.2d 643 (1954). *See also* **Hewitt**, 154 P.3d at 411 (citing this instruction); **Thompson**, 84 P.3d at 503; **Louder v. Jacobs**, 119 Colo. 511, 205 P.2d 236 (1949); **Wigger v. McKee**, 809 P.2d 999 (Colo. App. 1990) (action for malicious prosecution requires proof that plaintiff was prosecuted without probable cause); **B & K Distrib., Inc. v. Drake Bldg. Corp.**, 654 P.2d 324 (Colo. App. 1982) (lack of probable cause is necessary requirement of liability); **Sancetta v. Apollo Stereo Music Co.**, 44 Colo. App. 292, 616 P.2d 182 (1980) (citing this instruction).

2. In **McDonald v. Lakewood Country Club**, 170 Colo. 355, 363, 461 P.2d 437, 441 (1969), the court adopted the rule that “prosecuting attorneys are not liable in a civil action for malicious prosecution where they act in their official capacity, even though they act with malice and without probable cause. . . . This privilege does not embrace a situation of a prosecutor acting clearly outside the duties of his office.” The privilege accorded in **McDonald** to prosecuting attorneys does not extend to other administrative officials such as brand inspectors. **Hartford Fire Ins. Co. v. Kolar**, 30 Colo. App. 1, 488 P.2d 1114 (1971).

3. For a further discussion of an official’s immunity as a prosecutor in the context of liability under 42 U.S.C. § 1983 (2018), *see* **Higgs v. District Court**, 713 P.2d 840 (Colo. 1985).

4. In **Wagner v. Board of County Commissioners**, 933 P.2d 1311 (Colo. 1997), the court held that plaintiff’s claim for malicious prosecution based solely upon the defendant’s grand jury testimony was properly dismissed by the trial court because a witness before a grand jury is absolutely immune from civil liability for his or her testimony even if such testimony is knowingly false and malicious.

5. The plaintiff does not have to prove that he or she received a not guilty verdict. However, the plaintiff must prove a termination of the case in his or her favor. In **Hewitt**, 154 P.3d at 416, the court held that a favorable termination of the case must be a resolution on the merits, determined as a matter of law, and rejected a totality-of-the-

circumstances examination for deciding the issue. *See also Bell Lumber Co. v. Graham*, 74 Colo. 149, 219 P. 777 (1923) (voluntary settlement is not a favorable termination for purposes of malicious prosecution claim); *Schenck v. Minolta Office Sys., Inc.*, 802 P.2d 1131 (Colo. App. 1990); *Land v. Hill*, 644 P.2d 43 (Colo. App. 1981). Nor is a dismissal “in the interest of justice” at the prosecution’s request sufficient unless the facts demonstrate that the dismissal represented a favorable determination on the merits of the case. *Allen v. City of Aurora*, 892 P.2d 333 (Colo. App. 1994).

6. There is no requirement of a favorable termination where the claim is as to ex parte proceedings. *Hewitt*, 154 P.3d at 410; *Thompson*, 84 P.3d at 505. A claim based on improper filing of a lis pendens is not an ex parte proceeding. *Hewitt*, 154 P.3d at 416.

7. For purposes of complying with the 180-day notice required under the Colorado Governmental Immunity Act, see § 24-10-109, C.R.S., a claim for malicious prosecution accrues on the date when the claimant is aware that allegedly improper charges had been filed against him. *See Masters v. Castrodale*, 121 P.3d 362 (Colo. App. 2005).

**17:2 PROBABLE CAUSE—DEFINED**

**Probable cause means that the defendant, (*name*), in good faith believed, and that a reasonable person, under the same or similar circumstances, would also have believed, that the plaintiff, (*name*), was guilty of the offense with which (he) (she) was charged.**

**Notes on Use**

1. Note 1 of Notes on Use to Instruction 17:1 is also applicable to this instruction.

2. Whenever this instruction is given, Instruction 17:3 should also be given.

3. This instruction should be given only if the facts and circumstances relied upon as constituting "lack of probable cause" are in dispute. Where there is no factual dispute, the question is one of law to be resolved by the court and the court should, if it finds "lack of probable cause" to exist, instruct the jury accordingly.

**Source and Authority**

This instruction is supported by **Konas v. Red Owl Stores, Inc.**, 158 Colo. 29, 404 P.2d 546 (1965). *See also* **Montgomery Ward & Co. v. Pherson**, 129 Colo. 502, 272 P.2d 643 (1954); **Gurley v. Tomkins**, 17 Colo. 437, 30 P. 344 (1892).

### 17:3 PROBABLE CAUSE NOT DEPENDENT ON RESULT OF CRIMINAL CASE

**The fact that the criminal case (may have) ended in favor of the plaintiff, (*name*), does not in itself prove a lack of probable cause.**

#### Notes on Use

1. Note 1 of the Notes on Use to Instruction 17:1 is also applicable to this instruction.
2. When Instruction 17:2 is given, this instruction should also be given.
3. Use the parenthetical phrase “may have” if there is a dispute as to how the criminal case ended.

#### Source and Authority

This instruction is supported by **Montgomery Ward & Co. v. Pherson**, 129 Colo. 502, 272 P.2d 643 (1954). *See also* **Flader v. Smith**, 116 Colo. 322, 181 P.2d 464 (1947); **Climax Dairy Co. v. Mulder**, 78 Colo. 407, 242 P. 666 (1925); RESTATEMENT (SECOND) OF TORTS § 667(2) (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 119 (5th ed. 1984).

## 17:4 PRESENCE OF MALICE

The defendant, (*name*), was motivated by malice if (his) (her) primary motive was a motive other than a desire to bring to justice a person (he) (she) thought had committed a crime.

### Notes on Use

1. Note 1 of the Notes on Use to Instruction 17:1 is also applicable to this instruction.
2. Whenever this instruction is given, Instruction 17:5 should also be given.
3. This instruction must be appropriately modified if there is a dispute as to whether the defendant made the statements that caused the criminal case to be brought against the plaintiff.

### Source and Authority

This instruction is supported by **Suchey v. Stiles**, 155 Colo. 363, 394 P.2d 739 (1964); **Montgomery Ward & Co. v. Pherson**, 129 Colo. 502, 272 P.2d 643 (1954); **Louder v. Jacobs**, 119 Colo. 511, 205 P.2d 236 (1949); RESTATEMENT (SECOND) OF TORTS § 668 (1977); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 119 (5th ed. 1984).

**17:5 PROOF OF MALICE**

**A lack of probable cause may indicate malice. However, before you find malice based on a lack of probable cause, you must consider all the circumstances surrounding the filing and prosecution of the criminal case.**

**Notes on Use**

1. Note 1 of the Notes on Use to Instruction 17:1 is also applicable to this instruction.
2. This instruction should be given whenever Instruction 17:4 is given.

**Source and Authority**

This instruction is supported by **Koch v. Wright**, 67 Colo. 292, 184 P. 363 (1919). *See also* **Sancetta v. Apollo Stereo Music Co.**, 44 Colo. App. 292, 616 P.2d 182 (1980); **Florence Oil & Ref. Co. v. Huff**, 14 Colo. App. 281, 59 P. 624 (1900); RESTATEMENT (SECOND) OF TORTS § 669 (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 119 (5th ed. 1984).

## 17:6 LACK OF PROBABLE CAUSE NOT TO BE INFERRED FROM MALICE ALONE

**Malice alone is not enough to prove lack of probable cause.**

### Notes on Use

1. Note 1 of the Notes on Use to Instruction 17:1 is also applicable to this instruction.
2. This instruction should be given whenever Instructions 17:2 and 17:4 are given.

### Source and Authority

This instruction is supported by **O'Malley-Kelley Oil & Auto Supply Co. v. Gates Oil Co.**, 73 Colo. 140, 214 P. 398 (1923); **Gurley v. Tomkins**, 17 Colo. 437, 30 P. 344 (1892); and **W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 119** (5th ed. 1984).

## 17:7 AFFIRMATIVE DEFENSE—ADVICE OF ATTORNEY

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of malicious prosecution if you find that the defendant has proved the affirmative defense of advice of attorney. This affirmative defense is proved if you find all of the following:

1. The defendant made a full, fair, and honest disclosure to an attorney of all the facts the defendant knew or reasonably should have known concerning the guilt or innocence of the plaintiff;

2. The attorney (advised the defendant that there were reasonable grounds to believe that the plaintiff may have committed a crime) (or) (recommended the defendant take the action that was a cause of the criminal case being brought against the plaintiff); and

3. The defendant acted in good faith on the attorney's advice in causing the case to be brought against the plaintiff.

### Notes on Use

1. Note 1 of the Notes on Use to Instruction 17:1 is also applicable to this instruction.

2. Use whichever parenthesized phrases are appropriate.

3. Advice of counsel is an affirmative defense on which the defendant has the burden of proof.

4. This instruction is not applicable unless the lawyer consulted is disinterested. **Smith v. Hensley**, 107 Colo. 180, 109 P.2d 909 (1941); **W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS** § 119 (5th ed. 1984).

### Source and Authority

This instruction is supported by **Montgomery Ward & Co v. Pherson**, 129 Colo. 502, 272 P.2d 643 (1954); **Van Meter v. Bass**, 40

Colo. 78, 90 P. 637 (1907); RESTATEMENT (SECOND) OF TORTS § 666 (1977); and PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 119. See also **Antolovich v. Brown Grp. Retail**, 183 P.3d 582 (Colo. App. 2007) (reliance on advice of counsel is affirmative defense to malicious prosecution); W.R. Habeeb, Annotation, *Reliance on Advice of Prosecuting Attorney as Defense to Malicious Prosecution Action*, 10 A.L.R.2d 1215 (1950).

## 17:8 AFFIRMATIVE DEFENSE—ADVICE OF PROSECUTING ATTORNEY

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of malicious prosecution if you find that the defendant has proved the affirmative defense of advice of a prosecuting attorney. This affirmative defense is proved if you find all of the following:

1. The defendant made a full, fair, and honest disclosure to a prosecuting attorney of all the facts the defendant knew or reasonably should have known concerning the guilt or innocence of the plaintiff;

2. On the basis of these facts, the prosecuting attorney determined there were reasonable grounds to believe that the plaintiff may have committed a crime; and

3. The prosecuting attorney (brought) (advised bringing) the criminal case against the plaintiff.

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. Advice of a prosecuting attorney is an affirmative defense on which the defendant has the burden of proof.

### Source and Authority

1. This instruction is supported by **Montgomery Ward & Co. v. Pherson**, 129 Colo. 502, 272 P.2d 643 (1954); **Wyatt v. Burdette**, 43 Colo. 208, 95 P. 336 (1908); and **Van Meter v. Bass**, 40 Colo. 78, 90 P. 637 (1907). *See also* **B & K Distrib., Inc. v. Drake Bldg. Corp.**, 654 P.2d 324 (Colo. App. 1982); **W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 119** (5th ed. 1984).

2. In support of the proposition that reliance on the advice of the prosecuting attorney is an affirmative defense, see **Antolovich v. Brown Group Retail, Inc.**, 183 P.3d 582 (Colo. App. 2007). *See also* W.R. Habeeb, Annotation, *Reliance on Advice of Prosecuting Attorney as Defense to Malicious Prosecution Action*, 10 A.L.R.2d 1215 (1950).

**17:9 ACTUAL DAMAGES**

Plaintiff, (*name*), has the burden of proving the nature and extent of (his) (her) damages by a preponderance of the evidence. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the malicious prosecution of the plaintiff by the defendant(s), (*name(s)*), (and) (the [*insert appropriate description, e.g., "negligence"*]), if any, of any designated nonparties).

In determining these damages, you shall consider the following:

1. Any noneconomic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: physical and mental pain and suffering, fear, anxiety, humiliation, embarrassment, indignity, public disgrace, and any loss to plaintiff's reputation which were caused by the malicious prosecution.

2. Any economic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: court costs, reasonable attorney fees and any other reasonable expenses which the plaintiff has had in defending (himself) (herself) in the criminal case against (him) (her), a reasonable amount for the time the plaintiff necessarily lost in preparing for and in attending the trial of the criminal case, loss of income, damage to (his) (her) business, (and) (*insert any other items of special damage of which there is sufficient evidence*) which were caused by the malicious prosecution.

**Notes on Use**

1. Notes on Use to Instruction 6:1 and Notes 1 and 2 of Notes on Use to Instruction 17:1 are also applicable to this instruction.

2. The appropriate instruction relating to causation, see Instructions 9:18–9:21, should also be given with this instruction.

3. Use whichever parenthesized words are appropriate.

4. Omit any particular element of damages for which there is insufficient evidence to support a jury finding. Note, however, that in a malicious prosecution suit based on a criminal proceeding, an inference or presumption of injury to the plaintiff's reputation and of the existence of humiliation and hurt feelings may be based on the occurrence of the criminal proceeding alone. See **Bernstein v. Simon**, 77 Colo. 193, 235 P. 375 (1925) (as to injured reputation); **W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 119** (5th ed. 1984).

5. Because "the elements of the torts of intentional interference with contract and malicious prosecution are not the same[,] the damages caused by the conduct constituting each tort may not be identical." **Westfield Dev. Co. v. Rifle Inv. Assocs.**, 786 P.2d 1112, 1119 (Colo. 1990). Therefore, when both torts are involved in the same suit, the factfinder should make specific findings of fact with respect to the damages for each.

6. Comparative negligence is not a defense to an intentional tort claim. **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (1979). Therefore, the first paragraph of this instruction varies from the comparable damage instructions in "simple" negligence cases by eliminating any reference to plaintiff's own negligence.

### Source and Authority

This instruction is supported by **Murphy v. Hobbs**, 7 Colo. 541, 5 P. 119 (1884). See also **Bernstein**, 77 Colo. at 195-96, 235 P. at 376 (attorney fees and loss of reputation); **Johnston v. Deidesheimer**, 76 Colo. 559, 232 P. 1113 (1925); **Exch. Nat'l Bank v. Cullum**, 114 Colo. 26, 161 P.2d 336 (1945); **Hartford Fire Ins. Co. v. Kolar**, 30 Colo. App. 1, 408 P.2d 1114 (1971); **RESTATEMENT (SECOND) OF TORTS §§ 670-71** (1977); **PROSSER AND KEETON ON THE LAW OF TORTS, supra**, § 119.

## B. ABUSE OF PROCESS

### 17:10 ELEMENTS OF LIABILITY

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on *(his)* *(her)* claim of abuse of process, you must find that all of the following have been proved by a preponderance of the evidence:

1. The defendant, *(name)*, *(describe legal proceeding, e.g., "filed a lawsuit")*;
2. The defendant had an ulterior purpose for *(describe the legal proceeding)*;
3. The defendant willfully used the *(describe legal proceeding)* in an improper manner to *(insert description of alleged ulterior purpose)*; and
4. The defendant's action was a cause of the plaintiff's *(injuries)* *(damages)* *(losses)*.

If you find that one or more of these statements has not been proved by a preponderance of the evidence, then your verdict must be for the defendant.

On the other hand, if you find that all of these statements have been proved, *(then your verdict must be for the plaintiff)* *(then you must consider the defendant's affirmative defense(s) of [insert any affirmative defense that would be a complete defense to plaintiff's claim])*.

If you find that *(this affirmative defense has)* *(any one or more of these affirmative defenses have)* been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that *(this affirmative defense has not)* *(none of these affirmative defenses have)* been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. Omit any numbered paragraph, the facts of which are not in dispute.
2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.
3. If the defendant has put no affirmative defense in issue or if there is insufficient evidence to support such a defense, the last two paragraphs should be omitted.
4. Instruction 17:12 (defining ulterior purpose) should be given with this instruction.

### Source and Authority

1. This instruction is supported by **Parks v. Edward Dale Parrish LLC**, 2019 COA 13, ¶ 12, 452 P.3d 141; **Mackall v. JPMorgan Chase Bank**, 2014 COA 120, ¶ 39, 356 P.3d 946; **Colo. Cmty. Bank v. Hoffman**, 2013 COA 146, ¶ 37, 338 P.3d 390; **Mintz v. Accident & Injury Medical Specialists, PC**, 284 P.3d 62 (Colo. App. 2010), *aff'd on other grounds*, 2012 CO 50, 279 P.3d 658. *See also* **Hewitt v. Rice**, 154 P.3d 408 (Colo. 2007).
2. The abuse of process tort arose to provide a remedy where the malicious prosecution tort did not, namely where a legal procedure has been set in motion in proper form but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed. **Mintz**, 284 P.3d at 65–66. Thus, unlike the tort of malicious prosecution, for the plaintiff to establish a claim for abuse of process, it is not necessary to prove that the proceedings in which the process was used terminated in the plaintiff's favor, or that the process was obtained or proceedings started without probable cause. **Coulter v. Coulter**, 73 Colo. 144, 214 P. 400 (1923).
3. To establish a claim for abuse of process, the plaintiff must show (1) an ulterior purpose in the use of a judicial proceeding; (2) willful action by the defendant in the use of that process which is not proper in the regular course of the proceedings, i.e., use of a legal proceeding in an improper manner; and (3) resulting damage. **Parks**, 2019 COA 13, ¶ 13; **Mackall**, 2014 COA 120, ¶ 39; **Lauren Corp. v. Century Geophysical Corp.**, 953 P.2d 200, 202 (Colo. App. 1998).
4. As to the second element, an ulterior purpose is one that the legal proceeding was not designed to accomplish. **Mintz**, 284 P.3d at 66. Usually, the ulterior purpose is to obtain an advantage in another matter to achieve the surrender of property or the payment of money. *Id.*; **Walker v. Van Laningham**, 148 P.3d 391, 394 (Colo. App. 2006) (“The

improper purpose is 'ordinarily an attempt to secure from another some collateral advantage not properly includable in the process itself and is a form of extortion in which a lawfully used process is perverted to an unlawful use.' (citation omitted)).

5. As to the third element, there must also be some allegation that, viewed objectively, the judicial process is being used in an improper manner. There is no valid claim for abuse of process if the defendant's ulterior purpose was simply incidental to the proceeding's proper purpose. **Parks**, 2019 COA 13, ¶ 13; **Mintz**, 284 P.3d at 66. "The essential element of an abuse of process claim is the use of the legal proceeding in an improper manner; therefore, an improper use of the process must be established." **Active Release Techniques, LLC v. Xtomix, LLC**, 2017 COA 14, ¶ 6, 413 P.3d 210, 212 (quoting **Sterembuch v. Goss**, 266 P.3d 428 (Colo. App. 2011)). Although subjective motive is important in determining whether there was an ulterior purpose, it must also be established that, viewed objectively, there was an improper use of legal process. **Walker**, 148 P.3d at 394; *see also* **Hewitt**, 154 P.3d at 414 (distinguishing between abuse of process and malicious prosecution); **Am. Guar. & Liab. Ins. Co. v. King**, 97 P.3d 161 (Colo. App. 2003) (use of judicial process against wife to obtain money from husband is not a legitimate objective for that process). Although an ulterior motive may be inferred from the wrongful use of process, the wrongful use may not be inferred from the motive. **Hoffman**, 2013 COA 146, ¶ 38 (even if evidence allowed an inference that the sole intent was to divest defendants of their ownership interests in property, this evidence would establish only that the intervenors had an ulterior motive in bringing the action, and does not establish the requisite improper use of process).

6. When a claim for abuse of process is based on the use of a process that constitutes the exercise by the defendant of a First Amendment right to petition the government for redress of grievances, plaintiff must meet a "heightened standard" sufficient to show that the defendant's petitioning activities were not immunized from liability under the First Amendment. **Protect Our Mountain Env't, Inc. v. District Court**, 677 P.2d 1361 (Colo. 1984) ("POME"); *see also* **General Steel Domestic Sales v. Bacheller**, 2012 CO 68, ¶ 26, 291 P.3d 1. Specifically, a plaintiff must show that "(1) the defendant's administrative or judicial claims were devoid of reasonable factual support or . . . lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff." **POME**, 677 P.2d at 1369. This standard applies when the abuse challenged involves the filing of a lawsuit, as the "right to petition extends to all departments of the Government," and "[t]he right of access to the courts is . . . but one aspect of the right of petition." **Cal. Motor Transp. Co. v. Trucking Unlimited**, 404 U.S. 508, 510 (1972); *accord* **General Steel**, ¶ 23.

7. The heightened standard articulated in **POME** does not apply

where the alleged abuse of process involves a purely private as opposed to a public dispute. **Boyer v. Health Grades, Inc.**, 2015 CO 40, ¶ 15, 359 P.3d 25, 29 (finding the heightened standard articulated in **POME** “to be inapplicable to a resort to administrative or judicial process implicating purely private disputes” in suit alleging breach of fiduciary duty and misappropriation of trade secrets against former employees of plaintiff); **General Steel**, 2012 CO 68, ¶ 32 (declining to extend the heightened standard articulated in **POME** where the underlying alleged petitioning activity was the filing of an arbitration complaint in a purely private dispute). *But see In re Foster*, 253 P.3d 1244 (Colo. 2011) (concluding that First Amendment and due process concerns identified in **POME** are equally applicable in the context of an attorney discipline case as they are in a civil case).

8. Malice is not an essential element for liability for abuse of process. **Martinez v. Cont'l Enter.**, 697 P.2d 789 (Colo. App. 1984), *aff'd in part, rev'd in part on other grounds*, 730 P.2d 308 (Colo. 1986). It is sufficient if the defendant's principal purpose was other than a proper legal one. **Salstrom v. Starke**, 670 P.2d 809 (Colo. App. 1983) (jury could reasonably have found plaintiff liable on counterclaim for abuse of process for having intentionally filed, for an “ulterior purpose,” *lis pendens* notice that caused the defendant damage).

## 17:11 ACTUAL DAMAGES

**Plaintiff, (name), has the burden of proving the nature and extent of (his) (her) damages by a preponderance of the evidence. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the abuse of process by the defendant(s), (name(s)), (and) (the [insert appropriate description, e.g., "negligence"], if any, of any designated nonparties).**

**In determining these damages, you shall consider the following:**

**1. Any noneconomic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: any physical pain and suffering, mental anguish, fear, anxiety, humiliation, embarrassment, indignity, and public disgrace, and any loss to the plaintiff's reputation which were caused by the abuse of process.**

**2. Any economic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: court costs, reasonable attorney fees, and any other reasonable expenses the plaintiff has had in defending (himself) (herself) in any (proceeding) (or) (trial) against (him) (her), (and) a reasonable amount for the time (he) (she) lost in preparing for and in attending the proceeding or trial of the case, loss of income, damage to (his) (her) business, (and) (insert any other items of special damage of which there is sufficient evidence) which were caused by the abuse of process.**

### Notes on Use

1. Notes on Use to Instruction 17:9 are also applicable to this instruction.

2. Comparative negligence is not a defense to an intentional tort claim. **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (1979). Therefore, the first paragraph of this instruction varies from the compa-

rable damages instructions in “simple” negligence cases by eliminating any reference to plaintiff’s own negligence.

### Source and Authority

This instruction is supported by **Hewitt v. Rice**, 154 P.3d 408 (Colo. 2007). See also **Tech. Comput. Servs., Inc. v. Buckley**, 844 P.2d 1249 (Colo. App. 1992) (plaintiff may recover attorney fees incurred in defending against earlier litigation wrongfully instituted by defendant); **W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 121** (5th ed. 1984); Source and Authority to Instruction 17:9.

## 17:12 ULTERIOR PURPOSE—DEFINED

**An ulterior purpose is one that the legal proceeding was not designed to accomplish.**

### Notes on Use

This instruction should be given with Instruction 17:10 (elements of liability for abuse of process).

### Source and Authority

This instruction is supported by **Mintz v. Accident & Injury Medical Specialists, PC**, 284 P.3d 62, 66 (Colo. App. 2010) (“an ulterior purpose is one that the legal proceeding was not designed to accomplish”), *aff’d on other grounds*, 2012 CO 50, 279 P.3d 658. *See also* **Am. Guar. & Liab. Ins. Co. v. King**, 97 P.3d 161 (Colo. App. 2003); RESTATEMENT (SECOND) OF TORTS § 682 cmt. b (1977).

## CHAPTER 18. TRESPASS TO LAND

18:1 Trespass—Elements of Liability

18:2 Intentionally—Defined

18:3 Consent

18:4 Actual or Nominal Damages

### 18:1 TRESPASS—ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of trespass, you must find that (both) (all) of the following have been proved by a preponderance of the evidence:

1. The plaintiff was (the owner) (in lawful possession of) (*insert appropriate description of property*); and

2. The defendant intentionally (entered upon) (caused another to enter upon) (caused [*insert appropriate description*] to come upon) that property.

(3. The [*insert appropriate description*] caused physical damage to plaintiff's property.)

If you find that one of these statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that (both) (all) of these statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense

**has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. Use whichever parenthesized phrase is most appropriate.

2. Paragraph 3 should be used only when the intrusion onto property is intangible. *See Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377 (Colo. 2001) (intrusions of electromagnetic fields, radiation waves, and noise emitted from power lines do not cause physical damage and, therefore, will not support a claim of trespass).

3. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form). *See also Sanderson v. Heath Mesa Homeowners Ass'n*, 183 P.3d 679 (Colo. App. 2008) (on remand, liability for damages may be allocated to “act of God,” natural subsidence, and plaintiffs’ own irrigation if the evidence supports such an allocation).

4. Instruction 18:2, defining “intentionally,” must also be given with this instruction.

5. One may commit a trespass by affirmative conduct other than a direct entry. In such cases, this instruction must be appropriately modified. *See, e.g., Cobai v. Young*, 679 P.2d 121 (Colo. App. 1984) (defendants constructed their house so as to cause snow to slide off the roof and hit the plaintiff’s house).

### Source and Authority

1. This instruction is supported by *Huginin v. McCunniff*, 2 Colo. 367 (1874); and RESTATEMENT (SECOND) OF TORTS §§ 158-159 (1965). *See also Hoery v. United States*, 64 P.3d 214 (Colo. 2003); *Antolovich v. Brown Grp. Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007); *Trask v. Nozisko*, 134 P.3d 544 (Colo. App. 2006); *Gifford v. City of Colo. Springs*, 815 P.2d 1008 (Colo. App. 1991); *Burt v. Beautiful Savior Lutheran Church*, 809 P.2d 1064 (Colo. App. 1990) (trespass is the physical intrusion upon the property of another without the permission of the person lawfully entitled to possession of such property); *Magliocco v. Olson*, 762 P.2d 681 (Colo. App. 1987); *Docheff v. City of Broomfield*, 623 P.2d 69 (Colo. App. 1980); *Miller v. Carnation Co.*, 33 Colo. App. 62, 516 P.2d 661 (1973).

2. “The elements of the tort of trespass are a physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that property.” *Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int’l Union*,

2016 COA 72, ¶ 12, 382 P.3d 1249 (quoting **Sanderson**, 183 P.3d at 682). Only the person lawfully in actual or constructive possession of the land at the time of the trespass may maintain an action for trespass. **Hugunin**, 2 Colo. at 369; *see also* **Betterview Invs., LLC v. Pub. Serv. Co.**, 198 P.3d 1258 (Colo. App. 2008) (plaintiff may assert trespass claim even though it had no interest in the property when pipeline was placed on it because the trespass continued as long as the pipeline remained). A landlord, notwithstanding a lease, is in constructive possession for the purpose of maintaining a trespass action to vindicate a harm inflicted upon the landlord's reversionary interest. **Plotkin v. Club Valencia Condo. Ass'n**, 717 P.2d 1027 (Colo. App. 1986) (citing and paraphrasing this instruction for the definition of trespass). Similarly, the owner or lessee of a mineral estate may maintain a trespass action for an unauthorized geophysical exploration for that mineral notwithstanding such exploration was made with the consent of the surface owner. **Grynberg v. City of Northglenn**, 739 P.2d 230 (Colo. 1987). Either a landlord with a reversionary interest or a tenant in possession of premises is entitled to sue for trespass. **Gifford**, 815 P.2d at 1012.

3. A trespass may occur when the defendant originally had permission to be on the land, but such permission was subsequently revoked or otherwise terminated and defendant remained on the land. **RESTATEMENT** § 158; *see also* **Hugunin**, 2 Colo. at 371. Similarly, a trespass may occur when the defendant originally had a privilege to come upon the premises, but remained for a longer time than was reasonably necessary to accomplish the purposes of the privilege. **Walker v. City of Denver**, 720 P.2d 619 (Colo. App. 1986). In these cases, this instruction must be modified accordingly. *See also* **Gerrity Oil & Gas Corp. v. Magness**, 946 P.2d 913 (Colo. 1997) (where the privilege is defined in terms of reasonableness, trespass may occur only when holder of privilege acts unreasonably or unnecessarily); **Steiger v. Burroughs**, 878 P.2d 131 (Colo. App. 1994).

4. Plaintiff need not establish defendant's "willfulness" to prevail on a trespass claim. **Bittersweet Farms, Inc. v. Zimbelman**, 976 P.2d 326 (Colo. App. 1998); **Engler v. Hatch**, 472 P.2d 680 (Colo. App. 1970) (not published pursuant to C.A.R. 35(f)). However, liability for trespass requires a showing that the defendant "intended" to perform conduct that either constituted or caused an intrusion onto the property of another. **Antolovich**, 183 P.3d at 603; **Burt**, 809 P.2d at 1067; *see also* **RESTATEMENT** § 158.

5. Trespass may occur without direct entry: "A landowner who sets in motion a force which, in the usual course of events, will damage property of another is guilty of a trespass on such property." **Hoery**, 64 P.3d at 217 (quoting **Miller**, 33 Colo. App. at 68, 516 P.2d at 664).

6. Comparative negligence is not a defense to a claim for trespass, even though defendant's conduct may also have been negligent. **Burt**,

809 P.2d at 1067 (comparative negligence only a defense to negligence claims).

7. For a discussion of what constitutes a “geophysical trespass,” see **Mallon Oil Co. v. Bowen/Edwards Associates, Inc.**, 965 P.2d 105 (Colo. 1998).

8. There are no Colorado appellate decisions that address the issues of whether “privilege,” “consent,” and “license” are affirmative defenses to a claim for trespass. However, other jurisdictions that have considered the matter have concluded that such is the case. *See, e.g.*, **United States v. Imperial Irrigation Dist.**, 799 F. Supp. 1052 (S.D. Cal. 1992) (collecting cases); RESTATEMENT (SECOND) OF TORTS § 167.

9. For a discussion of the distinction between a continuing and a permanent trespass, see **Hoery**, 64 P.3d at 217-22 (continuing migration and ongoing presence of toxic pollution on plaintiff’s property constitutes a continuing trespass for limitation purposes, even though the condition causing the pollution has ceased). The statute of limitations for a continuing trespass does not begin to run until the defendant removes or stops the improper invasion. *Id.* at 220; **Sanderson**, 183 P.3d at 682. Continuing trespass and nuisance may occur when a defendant does not stop or remove continuing harmful physical conditions that are wrongfully placed on plaintiff’s land. **Smokebrush Found. v. City of Colo. Springs**, 2018 CO 10, ¶ 47, 410 P.3d 1236.

10. Section 34-45-101, C.R.S., elaborates on the rules of constructive possession for actions in which the plaintiff seeks to recover damages for the wrongful taking of ore.

## 18:2 INTENTIONALLY—DEFINED

A person intentionally (enters upon) (causes another to enter upon) (causes *[insert appropriate description]* to come upon) property when it is his or her purpose to (enter upon) (cause another to enter upon) (cause *[insert appropriate description]* to come upon) property, or when it is his or her purpose to do the act that in the natural course of events results in the intrusion.

### Notes on Use

This instruction should be used with Instruction 18:1.

### Source and Authority

1. This instruction is supported by **Hoery v. United States**, 64 P.3d 214 (Colo. 2003); **Antolovich v. Brown Grp. Retail, Inc.**, 183 P.3d 582 (Colo. App. 2007) (plaintiffs alleged that defendant caused chemical to come into plaintiffs' soil and groundwater); and **Miller v. Carnation Co.**, 33 Colo. App. 62, 516 P.2d 661 (1973). In **Hoery**, 64 P.3d at 218, the Colorado Supreme Court, in dicta, cited the language of RESTATEMENT (SECOND) OF TORTS § 158 cmt. i (1965): "It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." As a result, there is a question about whether knowledge is an element of trespass.

2. Colorado has rejected the tort of negligent trespass. **Burt v. Beautiful Savior Lutheran Church**, 809 P.2d 1064 (Colo. App. 1990). The only intent required is to do the act that itself constitutes or inevitably causes the intrusion.

3. For a discussion of the "natural course of events" language in this instruction, see **Antolovich**, 183 P.3d at 603.

## 18:3 CONSENT

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on *(his)* *(her)* claim of trespass if the affirmative defense of consent is proved. This defense is proved if you find both of the following:

1. By words or conduct or both, the plaintiff led the defendant to reasonably believe that the plaintiff consented to *(the defendant's entry)* *(the entry of [name of third person])* *(the [insert description] coming)* upon the *(insert description of property)*; and

2. *(The defendant entered)* *([name of third person] entered)* *(The [insert description] came)* upon *(insert description of property)* in a manner that was the same as or substantially similar to the manner consented to by the plaintiff.

### Notes on Use

Where the defendant raises the defense of privilege or license, the unnumbered introductory paragraph of this instruction, appropriately modified, should be used.

### Source and Authority

This instruction is based on RESTATEMENT (SECOND) OF TORTS § 167 cmt. c (1965) ("The burden of establishing the possessor's consent is upon the person who relies upon it.").

## 18:4 ACTUAL OR NOMINAL DAMAGES

**Plaintiff, (name), has the burden of proving the nature and extent of (his) (her) damages by a preponderance of the evidence. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the trespass of the defendant(s), (name[s]), (and the [insert appropriate description, e.g., "negligence"], if any, of any designated nonparties).**

**In determining these damages, you shall consider the following:**

**(1. [Version a] The difference between the reasonable market value of the real estate immediately before the trespass and its reasonable market value immediately after the trespass [; and])**

**(1. [Version b] The reasonable cost of [restoring] [repairing] [rebuilding] the property (and the decrease, if any, in market value of the property as [restored] [repaired] [rebuilt]) [; and])**

**(2. [insert any consequential damages the jury might reasonably find the plaintiff suffered as a result of the defendant's trespass].)**

**If you find in favor of the plaintiff but do not find any actual damages, you shall award (him) (her) nominal damages of one dollar.**

### Notes on Use

1. In some cases an appropriate instruction relating to causation may need to be given with this instruction. See Instructions 9:18 to 9:21.

2. Use whichever parenthesized and bracketed words and phrases are appropriate. For most cases, either the "diminution in value" measure of damages (Version a of parenthesized numbered paragraph 1) or the "cost of restoration" measure of damages (alternative Version b of parenthesized numbered paragraph 1) will be the proper measure for any physical injuries to the property.

3. There are, however, certain situations where yet another measure may be proper. *See, e.g., Bd. of Cty. Comm'rs v. Slovek*, 723 P.2d 1309 (Colo. 1986); *Heritage Vill. Owners Ass'n v. Golden Heritage Inv'rs, Ltd.*, 89 P.3d 513 (Colo. App. 2004). In such situations, this instruction must be appropriately modified.

4. In addition to recovering nominal or actual damages for physical injury to the property, the plaintiff may also be entitled to recover damages for certain consequential damages. When recoverable, if proved, these damages should be identified in the parenthesized numbered paragraph 2 and in additionally numbered paragraphs if necessary. *See also Calvaresi v. Nat'l Dev. Co.*, 772 P.2d 640 (Colo. App. 1988).

### Source and Authority

1. Version a of paragraph 1, the "diminution of value" rule, is supported by *Colorado Bridge & Construction Co. v. Preuit*, 75 Colo. 107, 224 P. 222 (1924); *Big Five Mining Co. v. Left Hand Ditch Co.*, 73 Colo. 545, 216 P. 719 (1923); *Mogote-Northeastern Consolidated Ditch Co. v. Gallegos*, 70 Colo. 550, 203 P. 668 (1922); and *Mustang Reservoir, Canal & Land Co. v. Hissman*, 49 Colo. 308, 112 P. 800 (1911). *See also Dandrea v. Bd. of Cty. Comm'rs*, 144 Colo. 343, 356 P.2d 893 (1960); *Denver, Tex. & Ft. Worth R.R. v. Dotson*, 20 Colo. 304, 38 P. 322 (1894).

2. Version b of paragraph 1, the "cost of restoration" rule, is supported by *Slovek*, 723 P.2d at 1316, which disapproved the view expressed in some earlier cases that the "diminution of value" rule is the only appropriate measure. Other cases that support the "cost of restoration" rule include *Colorado Bridge & Construction Co.*, 75 Colo. at 109, 224 P. at 223 (allowing as damages cost of removing asphalt that had been dumped on the plaintiff's property and stating, "[t]he rule to be applied should be such as will enable the jury to determine, as near as may be, the actual loss suffered"); and *Big Five Mining Co.*, 73 Colo. at 549, 216 P. 721 (allowing cost of restoration, as well as compensation for loss of use during repair, where injury is susceptible of remedy at moderate expense, and cost of restoring may be shown with reasonable certainty (distinguishing *Mogote-Northeastern Consolidated Ditch Co.*, 70 Colo. 550, 203 P. 668, and *Mustang Reservoir, Canal & Land Co.*, 49 Colo. 308, 112 P. 800)). *See also Zwick v. Simpson*, 193 Colo. 36, 572 P.2d 133 (1977) (cost of restorations not the appropriate measure where plaintiff had sold property prior to trial); *Bobrick v. Taylor*, 171 Colo. 375, 467 P.2d 822 (1970) (costs of restoration allowed as appropriate measure of damages); *Burt v. Beautiful Savior Lutheran Church*, 809 P.2d 1064 (Colo. App. 1990) (actual damages may include diminution of market value or costs of restoration, loss of use of the property, and discomfort and annoyance to the occupant); *Gladin v. Von Engeln*, 651 P.2d 905 (Colo. App. 1982) (even though not technically a trespass action, proper to award

cost of repair and loss of use where property damaged by removal of lateral support); **Evans v. Colo. Ute Elec. Ass'n**, 653 P.2d 63 (Colo. App. 1982) (costs of restoration allowed).

3. When either the “diminution of market value” or the “cost of restoration” would be an appropriate measure for the recovery of damages for physical injury to property, the trial court must use its sound discretion to determine which measure would be the more appropriate, that is, Version a or Version b of parenthesized numbered paragraph 1. *See Slovek*, 723 P.2d at 1317 (if cost of restoration, though more than the market value of the property, is not “wholly unreasonable” and market value is not adequate compensation for some personal or special reason, restoration costs may be awarded); **Fed. Ins. Co. v. Ferrellgas, Inc.**, 961 P.2d 511 (Colo. App. 1997). A “cost of restoration” measure may be used even though in some cases it may exceed either the diminution in market value caused by the trespass or the value of the land as it existed before the trespass occurred. *Slovek*, 723 P.2d at 1317. However, the cost of restoration measure is generally not applicable where no “personal or special use” of the property is shown. **Razi v. Schmitt**, 36 P.3d 102 (Colo. App. 2001) (award of damages to owner of commercial building that was damaged by arsonist’s fire limited to diminution in market value rather than cost of restoration where building was not used for any personal or special purpose).

4. For a discussion of the difference in damages recoverable for a “continuing trespass” as distinguished from a “permanent trespass,” see **Hawley v. Mowatt**, 160 P.3d 421 (Colo. App. 2007) (party injured by continuing trespass may not recover future damages, but party injured by permanent trespass may recover both past and future damages). *See also Rinker v. Colina-Lee*, 2019 COA 45, ¶ 83, 452 P.3d 161, 174 (“the traditional and preferred equitable remedy for a continuing trespass is a mandatory injunction requiring the removal of the encroachment”); **Hunter v. Mansell**, 240 P.3d 469 (Colo. App. 2010) (reversing legal remedy of damages for continuing trespass where equitable remedy of mandatory injunction was more appropriate).

5. Nominal damages are recoverable in an action for damages to real property if the action is one in trespass, C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 22 (1935), but not if the action is one in negligence. *See Hoover v. Shott*, 68 Colo. 385, 189 P. 848 (1920). Only nominal damages are recoverable when there is insufficient evidence of any actual damages resulting from a trespass. **Crawford v. French**, 633 P.2d 524 (Colo. App. 1981).

6. In appropriate circumstances, exemplary damages are recoverable in a trespass action. **Carlson v. McNeill**, 114 Colo. 78, 162 P.2d 226 (1945); **Livingston v. Utah-Colo. Land & Live Stock Co.**, 106 Colo. 278, 103 P.2d 684 (1940).

7. Several cases have recognized the right to recover consequential

damages, in addition to damages for physical injury to the property. *See, e.g., Slovek*, 723 P.2d at 1318 (loss of use value as well as personal injury to owner-occupant in form of discomfort, annoyance, sickness, physical harm); **Big Five Mining Co.**, 73 Colo. at 548, 216 P. at 720 (value of loss of use during repairs); **Sanderson v. Heath Mesa Homeowners Ass'n**, 183 P.3d 679 (Colo. App. 2008) (discomfort and annoyance, along with diminution of market value, costs of restoration, and loss of use damages); **Webster v. Boone**, 992 P.2d 1183 (Colo. App. 1999) (annoyance and discomfort, but not emotional distress); **Montgomery Ward & Co., Inc. v. Andrews**, 736 P.2d 40 (Colo. App. 1987) (destruction of business and termination of contract with third person); **Miller v. Carnation Co.**, 39 Colo. App. 1, 564 P.2d 127 (1977) (in a nuisance and trespass action, damages allowed for loss of use and enjoyment and annoyance, discomfort, inconvenience, and loss of ability to enjoy their lives); **Traver v. Dodd**, 24 Colo. App. 273, 133 P. 1117 (1913) (damages for wrongful occupancy as measured by reasonable rental value); *see also* **Valley Dev. Co. v. Weeks**, 147 Colo. 591, 597, 364 P.2d 730, 733 (1961) (in dictum, damages for mental suffering if trespass was “inspired by fraud, malice, or like motives”).

### **Damages for Destruction of Improvements (Buildings, Fences, etc.)**

8. Where a structure or improvement has been destroyed, as opposed to only being damaged, and it can be treated as a unit apart from the land, a more appropriate measure of damages may be the value of the improvement at the time of its destruction as shown by original cost of replacement, less depreciation. *McCORMICK, supra*, § 126.

### **Damages for Injuries to Crops**

9. If plaintiff is prevented from planting his land, then the measure of damages is the rental value of the land for the season. *Id.*; *see* **Roberts v. Lehl**, 27 Colo. App. 351, 149 P. 851 (1915) (loss is rental value of land with water less rental value of land without water).

10. For an annual, unmaturing crop that is destroyed, the measure of damages is the value of the unmaturing crop at the time and place of loss. *McCORMICK, supra*, § 126; *see* **Roberts**, 27 Colo. App. 357, 149 P. 853. *But see* **Harsh v. Cure Feeders, L.L.C.**, 116 P.3d 1286 (Colo. App. 2005) (farmer whose immature corn crop was partially destroyed by trespassing cattle was entitled to recover damages from owner of cattle based on difference between actual contract price for mature crop and what price would have been had crop not been damaged).

11. The measure of damages for crop loss caused by breach of warranty is “the amount the crop would have brought on the market less the costs incurred to raise, harvest, and sell” it, in other words, the farmer’s gross profits less the costs of operations. **Deacon v. Am. Plant Food Corp.**, 782 P.2d 861, 865 (Colo. App. 1989), *rev’d on other grounds*

*sub nom.* **Stone's Farm Supply, Inc. v. Deacon**, 805 P.2d 1109 (Colo. 1991).

12. For an annual, mature crop injured or destroyed, the measure of damages is the value of the crop at the time or place of its injury or destruction. **Smith v. Eichheim**, 147 Colo. 180, 363 P.2d 185 (1961).

13. Where a crop that does not require annual planting is injured or destroyed, if just this year's crop is injured or destroyed, the rules are the same as for annual crops. See **Hoover**, 68 Colo. at 387-88, 189 P. at 849 (by implication). If the injury goes deeper, damaging the roots, the measure of damage is diminution in the value of the land itself, or, alternatively, the cost of replanting plus loss of use of the land while it is being restored. **McCORMICK, supra**, § 126; see **Frankfort Oil Co. v. Abrams**, 159 Colo. 535, 413 P.2d 190 (1966) (diminution of value of land); **Bullerdick v. Pritchard**, 90 Colo. 272, 8 P.2d 705 (1932) (plaintiff recovered under the loss of the use of the land method for damage to his sheep from defendant's destruction of plaintiff's pasture grass); **Traver**, 24 Colo. App. at 277, 133 P. at 1119 (diminution in value theory).

### Damages for Injuries to Trees and Timber

14. When injury to or destruction of fruit trees or shade trees occurs, the better measure of damages is to let plaintiff choose either: (1) diminution in value of land (amount of reduction in the value of the realty), or (2) loss of value of trees considered separately (market value of the standing timber). **McCORMICK, supra**, § 126 (1935). The value of a unique growing tree is not limited to its value as lumber. Its aesthetic value may also be considered either by measuring damages by the diminution in the market value of the real property or by adding the aesthetic value of the tree to its value as lumber. **Kroulik v. Knuppel**, 634 P.2d 1027 (Colo. App. 1981).

15. For mature, standing timber, both methods give the same results, but the diminution in value of land method gives plaintiff a larger recovery when the trees are too small for cutting or are immature. **McCORMICK, supra**, § 126. This fact was implicitly recognized in **Manitou & Pike's Peak Ry. v. Harris**, 45 Colo. 185, 101 P. 61 (1909).

16. For cutting and appropriation of trees (not injury or destruction of trees), the rules are: (1) Where the trespasser made an innocent mistake, the measure of damage is the diminution in value of land or the value of the trees before cutting. **McCORMICK, supra**, § 126; (2) Where the trespasser knew he or she was taking another's property, the measure of damages is the value of the timber and its products as improved by defendant's labor without any allowance for costs of cutting, milling, or other processing. *Id.*

### Damages for Appropriation of Gravel, Ore, Coal, Oil, or other Minerals

17. Where the trespasser made an innocent mistake, the measure of damages is the value of the substance or mineral in place in the ground. *Id.* This may be measured in two ways. The first is the value in place as shown by "royalty value," which is the amount for which the landowner could sell the privilege of mining or removing the mineral. *Id.*; see **Colo. Cent. Consol. Mining Co. v. Turck**, 70 F. 294 (8th Cir. 1895). The second is the value of material at the surface less direct cost of extracting and lifting the mineral. McCORMICK, *supra*, § 126; see **O'Connor v. Rolfes**, 899 P.2d 227 (Colo. App. 1994); **St. Clair v. Cash Gold Mining & Milling Co.**, 9 Colo. App. 235, 47 P. 466 (1896) (defendant gets credited only with cost of extraction from plaintiff's claim, not with the cost of reaching plaintiff's claim). Where plaintiff's and defendant's ores were mingled, plaintiff gets the value of all the ore taken as shown by defendant's books unless defendant can show just what came from him or her and what came from plaintiff. **Little Pittsburg Consol. Mining Co. v. Little Chief Consol. Mining Co.**, 11 Colo. 223, 17 P. 760 (1888); see **St. Clair**, 9 Colo. App. at 244, 47 P. at 469. For a discussion of the alternative methods of measuring the value of minerals in place, such as the "royalty" value or the value of the minerals at the surface less the direct costs of extraction, see **Kroulik**, 634 P.2d at 1030-31 (citing this instruction).

18. Against a deliberate, willful appropriator, the measure of damages is the value at the mouth of the pit, or value when prepared and loaded in cars for final marketing, or amount of proceeds realized, with no deduction for labor, extracting, lifting, or processing. McCORMICK, *supra*, § 126; see **United Coal Co. v. Canon City Coal Co.**, 24 Colo. 116, 48 P. 1045 (1897) (Court announces the willful rule, but allowed trial court to apply nonwillful rule; conversion, however, was also involved.); **St. Clair**, 9 Colo. App. at 242, 47 P. at 468.

19. Plaintiff may choose to sue for conversion instead of trespass where the measure of damages is the value of the mineral after being severed less the reasonable cost of mining, raising, and hauling it. **Omaha & Grant Smelting & Ref. Co. v. Tabor**, 13 Colo. 41, 21 P. 925 (1889) (in action where plaintiff sued the party to whom the trespasser sold the ore, plaintiff receives no damages for diminished value of plaintiff's land, and it makes no difference whether the entry was intentional or innocent).

## **CHAPTER 19. DECEIT BASED ON FRAUD**

- 19:1 False Representation—Elements of Liability
- 19:2 Nondisclosure or Concealment—Elements of Liability
- 19:3 False Representation—Defined
- 19:4 Material Fact—Defined
- 19:5 Nondisclosure—Duty to Disclose
- 19:6 Concealment—Defined
- 19:7 False Representation—Reliance—Defined
- 19:8 Justifiable Reliance on False Representation—Defined
- 19:9 Justifiable Reliance—Nondisclosure or Concealment—Defined
- 19:10 Justifiable Reliance—No General Duty to Investigate
- 19:11 Reliance After Investigation
- 19:12 Statements of Future Intention or Promises as False Representations
- 19:13 Statements About the Future as False Representations
- 19:14 Statements of Law as False Representations
- 19:15 Statements of Opinion as False Representations
- 19:16 Affirmative Defense—Waiver by Plaintiff Before Plaintiff's Complete Performance
- 19:17 Actual Damages

### **19:1 FALSE REPRESENTATION—ELEMENTS OF LIABILITY**

**For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of deceit based on fraud, you must find all of the following have been proved by a preponderance of the evidence:**

- 1. The defendant made a false representation of a past or present fact;**
- 2. The fact was material;**
- 3. At the time the representation was made, the defendant:**
  - (a) knew the representation was false; or**

(b) was aware that (he) (she) did not know whether the representation was true or false;

4. The defendant made the representation with the intent that (the plaintiff) (a group of persons of which the plaintiff was a member) would rely on the representation;

5. The plaintiff relied on the representation;

6. The plaintiff's reliance was justified; and

7. This reliance caused (injuries) (damages) (losses) to the plaintiff.

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. When the alleged deceit is based on the concealment or nondisclosure of a material fact, rather than an overt misrepresentation, Instruction 19:2 should be used rather than this instruction. See **Ballow v. PHICO Ins. Co.**, 875 P.2d 1354 (Colo. 1993); **Colo. Interstate Gas Co. v. Chemco, Inc.**, 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993).

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form).

3. Omit any numbered paragraphs, the facts of which are not in dispute.

4. Use whichever parenthesized words are most appropriate and omit the parenthesized clause of the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

5. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

6. Other appropriate instructions defining the terms used in this instruction, for example, Instruction 19:4, defining “material fact,” must be given with this instruction, and, when necessary, an appropriate instruction or instructions relating to causation must be given. *See* Instructions 9:18 to 9:21.

7. In common-law actions for deceit or in statutory actions under what is now section 42-6-204, C.R.S., based on a misrepresentation in the mileage disclosure statement required by section 42-6-202(5), C.R.S., or created by concealing the actual mileage of a motor vehicle as prohibited by section 42-6-202(1), there is a rebuttable presumption that a purchaser who received the mileage representation justifiably relied on the representation and that the representation was material to the transaction. **Lurvey v. Phil Long Ford, Inc.**, 37 Colo. App. 11, 541 P.2d 114 (1975). In those cases, Instruction 3:5, incorporating this presumption, must be given with this instruction or, in a concealment case, with Instruction 19:2.

### Source and Authority

1. This instruction is supported by and was cited with approval by the Colorado Supreme Court in **Bristol Bay Productions, LLC v. Lampack**, 2013 CO 60, ¶ 26, 312 P.3d 1155, 1160 (“For ease of understanding, Colorado’s Model Jury Instructions unpack the fifth element into its three discrete sub-parts, requiring the plaintiff to prove separately actual reliance, the reasonableness of that reliance, and that the plaintiff’s reliance caused its damages.”). This instruction is also supported by **Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP**, 2018 CO 54, ¶ 53, 420 P.3d 223; **Knight v. Cantrell**, 154 Colo. 396, 390 P.2d 948 (1964); **Morrison v. Goodspeed**, 100 Colo.

470, 68 P.2d 458 (1937); **Colorado Springs Co. v. Wight**, 44 Colo. 179, 96 P. 820 (1908); and **Sellar v. Clelland**, 2 Colo. 532 (1875). *See also* **Vinton v. Virzi**, 2012 CO 10, ¶ 15, 269 P.3d 1242; **Concord Realty Co. v. Cont'l Funding Corp.**, 776 P.2d 1114 (Colo. 1989); **Alzado v. Blinder, Robinson & Co.**, 752 P.2d 544 (Colo. 1988); **Kinsey v. Preeson**, 746 P.2d 542 (Colo. 1987); **Trimble v. City & County of Denver**, 697 P.2d 716 (Colo. 1985); **Just in Case Bus. Lighthouse, LLC v. Murray**, 2013 COA 112M, ¶ 46, 383 P.3d 1, *aff'd in part, rev'd in part on other grounds*, 2016 CO 47M, 374 P.3d 443; **Barfield v. Hall Realty, Inc.**, 232 P.3d 286 (Colo. App. 2010) (citing this instruction); **Platt v. Aspenwood Condo. Ass'n**, 214 P.3d 1060 (Colo. App. 2009); **Nelson v. Gas Research Inst.**, 121 P.3d 340 (Colo. App. 2005); **Robert K. Schader, P.C. v. Etta Indus., Inc.**, 892 P.2d 363 (Colo. App. 1994); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986); **Forsyth v. Associated Grocers of Colo., Inc.**, 724 P.2d 1360 (Colo. App. 1986) (citing with approval the elements as set out in this instruction); **Club Valencia Homeowners Ass'n v. Valencia Assocs.**, 712 P.2d 1024 (Colo. App. 1985).

2. Paragraph number 3 is supported by **Meredith v. Ramsdell**, 152 Colo. 548, 552, 384 P.2d 941, 944 (1963) (“[a] person who misleads another by word or act to believe a fact exists, when he knows it does not, is guilty of fraud, notwithstanding he entertains a belief and expectation that it will come into existence”); **Denver Business Sales Co. v. Lewis**, 148 Colo. 293, 365 P.2d 895 (1961) (trial court reversed in a deceit case based on nondisclosure for instructing the jury that the defendant was liable if he failed to disclose a fact which “by the exercise of reasonable prudence” he should have known); **Pattridge v. Youmans**, 107 Colo. 122, 126, 109 P.2d 646, 648 (1941) (“[h]e who makes a representation as of his own knowledge, not knowing whether it is true or false, and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue”); **Otis & Co. v. Grimes**, 97 Colo. 219, 221-22, 48 P.2d 788, 789 (1935) (actual knowledge of falsity not required and it is enough if the representation is made “with reckless ignorance of its truth or falsity” or “made . . . recklessly, careless [of] whether it be true or false,” or is made with “no knowledge whether his assertion is true or false”); and **Lahay v. City National Bank of Denver**, 15 Colo. 339, 25 P. 704 (1891) (same). *See also* **Overland Dev. Co. v. Marston Slopes Dev. Co.**, 773 P.2d 1112 (Colo. App. 1989); HARPER, JAMES AND GRAY ON TORTS, *supra*, § 7.3; PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 107. The language of paragraph 3 was cited with approval in **Sodal v. French**, 35 Colo. App. 16, 531 P.2d 972 (1974), *aff'd on other grounds sub nom. Slack v. Sodal*, 190 Colo. 411, 547 P.2d 923 (1976).

3. Numbered paragraph 5 is specifically supported by **Huston v. Ohio & Colorado Smelting & Refining Co.**, 63 Colo. 152, 165 P. 251 (1917) (plaintiff denied relief for damages caused by his reliance which was other than that intended by the defendant). *See also* **Nielson v. Scott**, 53 P.3d 777 (Colo. App. 2002) (summary judgment proper where no evidence that reliance on false representation was justified); **Soneff v. Harlan**, 712 P.2d 1084 (Colo. App. 1985) (no evidence of detrimental reliance); **Blinder, Robinson & Co. v. Alzado**, 713 P.2d 1314 (Colo.

App. 1985), *aff'd in part, rev'd in part on other grounds*, 752 P.2d 544 (Colo. 1988).

4. The cases cited above in general support of this instruction do not use the phrase “justifiable reliance” as set out in numbered paragraph 6. In a deceit action, however, while the plaintiff’s reliance need not be “reasonable” in the sense of the objective standard of the reasonably prudent man, **Foster v. O’Farrell**, 75 Colo. 170, 225 P. 217 (1924), it may not be wholly unwarranted. *See* Instructions 19:8, 19:9, 19:10, and 19:11; *see also* **Fasing v. LaFond**, 944 P.2d 608 (Colo. App. 1997) (element of claim is “reasonable reliance” on the alleged misrepresentation); **Frontier Expl., Inc. v. Am. Nat’l Fire Ins. Co.**, 849 P.2d 887 (Colo. App. 1992) (false representation requires justifiable reliance by the one to whom the representation is made).

5. In a deceit action, actual damages must be proved as an element of the tort. **W. Cities Broad., Inc. v. Schueller**, 849 P.2d 44 (Colo. 1993); **Black v. First Fed. Sav. & Loan Ass’n**, 830 P.2d 1103 (Colo. App. 1992), *aff’d on other grounds sub nom. La Plata Med. Ctr. Assocs. v. United Bank of Durango*, 857 P.2d 410 (Colo. 1993); **Harrison v. Smith**, 821 P.2d 832 (Colo. App. 1991); **Dann v. Perrotti & Hauptman Dev. Co.**, 670 P.2d 448 (Colo. App. 1983); **Greenleaf, Inc. v. Manco Chem. Co.**, 30 Colo. App. 367, 492 P.2d 889 (1971).

6. In **Williams v. Boyle**, 72 P.3d 392 (Colo. App. 2003), the court held that expert testimony and a certificate of review were required to establish plaintiff’s fraudulent misrepresentation and fraudulent concealment claims against a physician who had allegedly misinformed plaintiff regarding the effects of a medication that the physician had prescribed.

7. For fraud as a defense to a breach of contract action, see Instruction 30:18. For an excellent discussion of the various remedies and defenses which may be based on fraud, see PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 105.

8. Under section 13-25-127, C.R.S., the plaintiff’s burden of proof is by a preponderance of the evidence, rather than by “clear and convincing” evidence, as was the earlier rule. *See* **Wiley v. Byrd**, 158 Colo. 479, 408 P.2d 72 (1965) (evidence of “fraud” must be clear and convincing); **Wallick v. Eaton**, 110 Colo. 358, 363, 134 P.2d 727, 729 (1943) (proof of fraud must be “clear, precise and indubitable”).

9. For recovery for financial losses arising out of a business relationship caused by a negligently made misrepresentation on which the plaintiff relied, see Instruction 9:4. Also, for the tort of negligent misrepresentation resulting in physical harm, see Instruction 9:3.

10. In certain cases, the usual common-law requirements for the tort of deceit may have been changed by statute. *See, e.g.*, § 13-21-109, C.R.S. (damages recoverable for writing checks or other instruments

when no account or insufficient funds). *See also* **First Nat'l Bank of Durango v. Lyons**, 2015 COA 19, ¶ 28, 349 P.3d 1161, 1166 (a fraud claim under the Colorado Securities Act could lie in tort for purposes of the Colorado Governmental Immunity Act because section 11-51-604 (3) provides that “[a]ny person who recklessly, knowingly, or with an intent to defraud sells or buys a security in violation of [this section] . . . is liable to the person buying or selling such security”); **Barfield**, 232 P.3d at 291 (section 12-61-807, C.R.S., expressly provides that agent acting as real estate “transaction broker” has no duty to investigate whether property could be used as RV park or to verify accuracy of seller’s representations, and failure to do so could not be basis for negligent misrepresentation or fraud claim); **Nelson**, 121 P.3d at 344 (elements to establish action for fraud under section 8-2-104, C.R.S., prohibiting obtaining workers by misrepresentation, are the same as those for common-law fraud). In other cases, common-law fraud requirements remain the same. *See, e.g.,* **In re Estate of Gattis**, 2013 COA 145, ¶ 16, 318 P.3d 549, 554 (“home sellers’ common law duty to disclose known but latent defects in the property has long been recognized”).

11. Where a plaintiff has been induced fraudulently to enter into two related contracts as part of the same general transaction, the plaintiff need not elect the same remedy for both contracts. The plaintiff may elect to affirm one and sue for damages in deceit, and rescind the other and seek restitution for any consideration paid. Plaintiff should not be required to elect the same remedy for both contracts unless necessary to prevent double recovery or because the assertion of different remedies would be so inconsistent that the assertion of one would necessarily be a repudiation of the other. **Stewart v. Blanning**, 677 P.2d 1382 (Colo. App. 1984).

12. Lack of privity with a remote purchaser does not insulate a seller of property from liability for false representation arising out of a failure to disclose a latent defect which materially affected the desirability of the property. **Iverson v. Solsbery**, 641 P.2d 314 (Colo. App. 1982); **Schnell v. Gustafson**, 638 P.2d 850 (Colo. App. 1981).

13. A disclosed principal may be held liable in deceit for a misrepresentation made by an agent within the scope of a transaction the agent was authorized to effect. **Erickson v. Oberlohr**, 749 P.2d 996 (Colo. App. 1987).

14. A fraud claim based on only vicarious liability is insufficient. **Just in Case Business Lighthouse**, 2013 COA 112M, ¶ 64.

15. There is authority for the proposition that if the plaintiff has access to information that would have led to the discovery of the true facts and such information was equally available to both parties, then plaintiff’s reliance is not justified or reasonable as a matter of law. *See* **Colo. Coffee Bean, LLC v. Peaberry Coffee, Inc.**, 251 P.3d 9 (Colo. App. 2010); **Balkind v. Telluride Mtn. Title Co.**, 8 P.3d 581 (Colo.

App. 2000); *see also* **Vinton**, 2012 CO 10, ¶ 17; **M.D.C./Wood, Inc. v. Mortimer**, 866 P.2d 1380 (Colo. 1994). However, for a different test, *see* the authority cited in the Source and Authority to Instructions 19:8 to 19:10.

16. The “economic loss rule” bars recovery on post-contractual claims for fraudulent concealment and fraudulent misrepresentation which arise out of contract rather than tort duties. **Hamon Contractors, Inc. v. Carter & Burgess, Inc.**, 229 P.3d 282 (Colo. App. 2009); *see also* **Top Rail Ranch Estates, LLC v. Walker**, 2014 COA 9, ¶ 39, 327 P.3d 321 (economic loss rule barred fraud claims); **In re Estate of Gattis**, 2013 COA 145, ¶ 14 (economic loss rule does not bar a nondisclosure claim against a home seller for latent defects known to the seller). The “economic loss rule” does not, however, bar claims that a party was induced to enter into a contract based on fraudulent misrepresentation or fraudulent concealment. **Van Rees v. Unleaded Software, Inc.**, 2016 CO 51, ¶ 15, 373 P.3d 603.

## 19:2 NONDISCLOSURE OR CONCEALMENT— ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of deceit based on fraud, you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant (concealed a past or present fact) (failed to disclose a past or present fact which [he] [she] had a duty to disclose);
2. The fact was material;
3. The defendant (concealed it) (failed to disclose it) with the intent of creating a false impression of the actual facts in the mind of the plaintiff;
4. The defendant (concealed) (failed to disclose) the fact with the intent that the plaintiff take a course of action (he) (she) might not take if (he) (she) knew the actual facts;
5. The plaintiff took such action or decided not to act relying on the assumption that the (concealed) (undisclosed) fact did not exist or was different from what it actually was;
6. The plaintiff's reliance was justified; and
7. This reliance caused (injuries) (damages) (losses) to the plaintiff.

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*in-*

*sert any affirmative defense that would be a complete defense to plaintiff's claim]).*

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. With the exception of the first Note on Use, the remaining Notes on Use to Instruction 19:1 are also applicable to this instruction and should be read and applied accordingly.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, section 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form).

3. When the alleged deceit is based on an overt misrepresentation, rather than a concealment or nondisclosure, Instruction 19:1 should be used rather than this instruction.

### Source and Authority

1. In addition to the authority cited and discussed in the Source and Authority to Instruction 19:1, this instruction is supported by **Baker v. Wood, Ris & Hames, P.C.**, 2016 CO 5, ¶ 59, 364 P.3d 872; **BP America Production Co. v. Patterson**, 263 P.3d 103 (Colo. 2011); **Mallon Oil Co. v. Bowen/Edwards Associates, Inc.**, 965 P.2d 105 (Colo. 1998); **Ballow v. PHICO Insurance Co.**, 875 P.2d 1354 (Colo. 1993); **Kopeikin v. Merchants Mortgage & Trust Corp.**, 679 P.2d 599 (Colo. 1984) (direct evidence of plaintiff's reliance is not required); **Ackmann v. Merchants Mortgage & Trust Corp.**, 645 P.2d 7 (Colo. 1982) (fraud as defense to breach of contract and rescission and restitution); **Teodonno v. Bachman**, 158 Colo. 1, 404 P.2d 284 (1965); **Carpenter v. Donohoe**, 154 Colo. 78, 388 P.2d 399 (1964); **Cahill v. Readon**, 85 Colo. 9, 273 P. 653 (1928) (rescission action); **Patterson v. BP America Production Co.**, 2015 COA 28, ¶ 38, 360 P.3d 211; **Wainscott v. Centura Health Corp.**, 2014 COA 105, ¶ 77, 351 P.3d 513; **Maxwell v. United Services Automobile Ass'n**, 2014 COA 2, ¶ 19, 342 P.3d 474 (if all five elements can be resolved by common questions of law or fact, fraudulent concealment claim can be certified as a

class action); **Jehly v. Brown**, 2014 COA 39, ¶ 9, 327 P.3d 351; **Just in Case Business Lighthouse, LLC v. Murray**, 2013 COA 112M, 383 P.3d 1, *aff'd in part, rev'd in part on other grounds*, 2016 CO 47M, 374 P.3d 443; **In re Estate of Gattis**, 2013 COA 145, ¶ 9, 318 P.3d 549 (citing this instruction); **Colorado Coffee Bean, LLC v. Peaberry Coffee, Inc.**, 251 P.3d 9 (Colo. App. 2010); **Barfield v. Hall Realty, Inc.**, 232 P.3d 286 (Colo. App. 2010) (elements of fraudulent concealment); **Frontier Exploration, Inc. v. American National Fire Insurance Co.**, 849 P.2d 887 (Colo. App. 1992); **Black v. First Federal Savings & Loan Ass'n**, 830 P.2d 1103 (Colo. App. 1992) (deceit action based on nondisclosure), *aff'd sub nom. La Plata Medical Center Associates, Ltd. v. United Bank of Durango*, 857 P.2d 410 (Colo. 1993); **Colorado Interstate Gas Co. v. Chemco, Inc.**, 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993); **Berger v. Security Pacific Information Systems, Inc.**, 795 P.2d 1380 (Colo. App. 1990); **Colorado Performance Corp. v. Mariposa Associates**, 754 P.2d 401 (Colo. App. 1987); **Basnett v. Vista Village Mobile Home Park**, 699 P.2d 1343 (Colo. App. 1984) (elements of deceit by nondisclosure), *rev'd on other grounds*, 731 P.2d 700 (Colo. 1987); **Carlson v. Garrison**, 689 P.2d 735 (Colo. App. 1984) (elements of deceit by nondisclosure); **Johnson v. Graham**, 679 P.2d 1090 (Colo. App. 1983), *rev'd in part on other grounds sub nom. Tri-Aspen Construction Co. v. Johnson*, 714 P.2d 484 (Colo. 1986); **Schnell v. Gustafson**, 638 P.2d 850 (Colo. App. 1981); **Xerox Corp. v. ISC Corp.**, 632 P.2d 618 (Colo. App. 1981) (fraud as defense to breach of contract and counterclaim for damages); 2 F. HARPER, ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.14 (3rd ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106 (5th ed. 1984).

2. The element of intent in paragraph 3 of this instruction is supported by **Anson v. Trujillo**, 56 P.3d 114 (Colo. App. 2002).

3. Although the courts have generally used “concealment” to mean the same thing as “nondisclosure,” “concealment” is used in these instructions to mean more than the simple act of remaining silent when there is a duty to speak, which is the usual meaning of “nondisclosure.” Compare Instruction 19:6, with Instruction 19:5. See also **Wisehart v. Zions Bancorporation**, 49 P.3d 1200 (Colo. App. 2002) (fraudulent concealment and fraudulent nondisclosure are sometimes used interchangeably, and the two torts require essentially the same elements).

4. To establish a claim for fraudulent concealment or nondisclosure, the plaintiff must show that the defendant had a duty to disclose information. **Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP**, 2018 CO 54, ¶ 57, 420 P.3d 223, 234 (“RMEI has not asserted, nor could it assert, that DG&S owed it a duty to disclose Tracker’s existence . . . . [W]ere we to impose such a duty on DG&S here, parties would no longer be permitted to conduct transactions involving undisclosed principals.”); **Mallon Oil Co.**, 965 P.2d at 111; **Wainscott**, 2014 COA 105, ¶ 79; **Burman v. Richmond Homes Ltd.**, 821 P.2d 913 (Colo. App. 1991). Whether a defendant has a duty to dis-

close a particular fact is a question of law. **Burman**, 821 P.2d at 918; **Berger**, 795 P.2d at 1383; *see also* **Poly Trucking, Inc. v. Concentra Health Servs., Inc.**, 93 P.3d 561 (Colo. App. 2004); **Bair v. Pub. Serv. Employees Credit Union**, 709 P.2d 961 (Colo. App. 1985) (applying the provisions of RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1977), for purposes of determining whether a duty to disclose exists in a business transaction).

5. For circumstances in which a duty of disclosure may arise, see Instruction 19:5 and its Notes on Use.

6. In **Williams v. Boyle**, 72 P.3d 392 (Colo. App. 2003), the court held that expert testimony and a certificate of review were required to establish plaintiff's fraudulent misrepresentation and fraudulent concealment claims against a physician who had allegedly misinformed plaintiff regarding the effects of a medication that the physician had prescribed.

7. Justifiable reliance is an element common to both fraudulent misrepresentation and fraudulent concealment claims. **Nielson v. Scott**, 53 P.3d 777 (Colo. App. 2002).

8. In a fraudulent concealment claim, an exculpatory clause may preclude reasonable reliance on nondisclosure if the clause explains why certain inferences should not be drawn. *See* **Colo. Coffee Bean, LLC**, 251 P.3d at 21-22.

9. The "economic loss rule" bars recovery on claims for post-contractual fraudulent concealment and fraudulent misrepresentation that arise out of the contract and not any independent tort duty. **Hamon Contractors, Inc. v. Carter & Burgess, Inc.**, 229 P.3d 282 (Colo. App. 2009); *see also* **Top Rail Ranch Estates, LLC v. Walker**, 2014 COA 9, ¶ 39, 327 P.3d 321 (economic loss rule barred fraud claims); **In re Estate of Gattis**, 2013 COA 145, ¶ 14 (economic loss rule does not bar a nondisclosure claim against a home seller for latent defects known to the seller).

## 19:3 FALSE REPRESENTATION—DEFINED

**A false representation is any oral or written words, conduct, or combination of words and conduct that creates an untrue or misleading impression in the mind of another.**

### Notes on Use

This instruction should be given with Instruction 19:1.

### Source and Authority

This instruction is supported by **Meredith v. Ramsdell**, 152 Colo. 548, 552, 384 P.2d 941, 944 (1963) (rescission against principal and deceit against agent; “[a] person who misleads another by word or act to believe that a fact exists, when he knows it does not, is guilty of fraud”); **Corder v. Laws**, 148 Colo. 310, 366 P.2d 369 (1961) (creation of a false impression, by whatever means, is the gist of a false representation); **Cahill v. Readon**, 85 Colo. 9, 14, 273 P. 653, 655 (1928) (“[a] statement literally true is actionable, if made to create an impression substantially false”); **Nelson v. Gas Research Institute**, 121 P.3d 340 (Colo. App. 2005); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.14 (3rd ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106 (5th ed. 1984).

## 19:4 MATERIAL FACT—DEFINED

A fact is material if a reasonable person under the circumstances would regard it as important in deciding what to do.

A fact may also be material even though a reasonable person might not regard it as important, if (the person stating it knows that) (the person concealing it knows that) the person receiving the information would regard it as important in deciding what to do.

### Notes on Use

1. Use whichever parenthesized phrase is more appropriate.

2. The second paragraph should be given only in cases where there is evidence to support it and, also, where there is evidence that the defendant may have deliberately taken advantage of the plaintiff's deficiencies or peculiarities.

3. This instruction should not be used for claims brought under sections 11-51-501(1)(b) and 11-51-604(4), C.R.S., for damages for fraud in the sale of securities. **Goss v. Clutch Exch., Inc.**, 701 P.2d 33, 36 (Colo. 1985) (The appropriate test for materiality under the Colorado Securities Act is whether there was a "substantial likelihood that a reasonable investor would consider the matter important in making an investment decision.").

### Source and Authority

1. This instruction is supported by 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.9 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108, at 753-54 (5th ed. 1984). *See also* **Wade v. Olinger Life Ins. Co.**, 192 Colo. 401, 560 P.2d 446 (1977) (citing instruction with approval); **Mullen v. Allstate Ins. Co.**, 232 P.3d 168 (Colo. App. 2009) (insurer was not required to provide information about business practices of other companies and therefore did not fail to disclose material fact); **Briggs v. Am. Nat'l Prop. & Cas. Co.**, 209 P.3d 1181 (Colo. App. 2009) (jury could conclude insurance policy purchaser might have made different decision if aware that an invalid exclusion was included in his policy); **Denberg v. Loretto Heights College**, 694 P.2d 375 (Colo. App. 1984) (using language of first paragraph). In addition, several Colorado cases have considered the definition of "material" as part of the definition of reliance. *See* Source and Authority to Instruction 19:7.

2. Many Colorado cases require that the representation be

“material.” See Source and Authority to Instructions 19:1 and 19:2.

**19:5 NONDISCLOSURE—DUTY TO DISCLOSE**

The defendant, (*name*), had a duty to disclose material facts if (he) (she) knew about them and if:

(1. The defendant and the plaintiff were in a [confidential] [or] [fiduciary] relationship) (or)

(2. The defendant stated some facts, but not all material facts, knowing that they would create a false impression in the mind of the plaintiff) (or)

(3. The defendant knew that by [his] [her] own unclear or deceptive words or conduct that [he] [she] created a false impression of the actual facts in the mind of the plaintiff) (or)

(4. The defendant knew that the plaintiff was not in a position to discover the facts for [himself] [herself]) (or)

(5. The defendant communicated material facts that were true or that [he] [she] believed were true at the time the time they were communicated. Later, the defendant learned that the material facts were [not] [no longer] true and knew that the plaintiff was acting under the impression that the facts were true) (or)

(6. The defendant promised to perform an act or communicated an intention to perform an act knowing that undisclosed facts made [his] [her] performance unlikely.)

**Notes on Use**

1. Only those parenthesized or bracketed portions of this instruction should be used as are appropriate to the evidence in the case. If the false representation was allegedly made to someone other than the plaintiff, then this instruction must be appropriately modified.

2. When appropriate, this instruction should be given with Instruction 19:2.

3. If reasonable minds could not differ as to the facts giving rise to a duty to disclose, the existence of that duty is a matter of law for the court to determine. *See, e.g., Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 (1937); *Colo. Interstate Gas Co. v. Chemco, Inc.*, 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993); *Burman v. Richmond Homes, Ltd.*, 821 P.2d 913 (Colo. App. 1991). This instruction has been drafted to cover those specific situations that have so far been recognized by the courts. *See Source and Authority below*. It is not intended to be exhaustive of all possible situations.

4. For a definition of "confidential relationship," see Instruction 34:18. For a definition of "fiduciary relationship," see Instructions 26:2 and 26:3.

### Source and Authority

1. The numbered paragraphs of this instruction are supported by the following cases. Paragraph 1: *Hanson v. Chamberlin*, 76 Colo. 562, 233 P. 830 (1925) (duty of disclosure between joint venturers); *Pouppirt v. Greenwood*, 48 Colo. 405, 110 P. 195 (1910) (agency relationship). Paragraph 2: *Mallon Oil Co. v. Bowen/Edwards Assocs., Inc.*, 965 P.2d 105 (Colo. 1998); *Corder v. Laws*, 148 Colo. 310, 366 P.2d 369 (1961); *Cahill v. Readon*, 85 Colo. 9, 14, 273 P. 653, 655 (1928) ("[a] statement literally true is actionable, if made to create an impression substantially false"); *Berger v. Sec. Pac. Info. Sys., Inc.*, 795 P.2d 1380 (Colo. App. 1990) (prospective employer's duty to disclose information to prospective employee). Paragraph 3: *Meredith v. Ramsdell*, 152 Colo. 548, 384 P.2d 941 (1963); *Feit v. Donahue*, 826 P.2d 407 (Colo. App. 1992); *H & H Distribs., Inc. v. BBC Int'l, Inc.*, 812 P.2d 659 (Colo. App. 1990). Paragraph 4: *Cohen v. Vivian*, 141 Colo. 443, 349 P.2d 366 (1960) (by implication); *Morrison*, 100 Colo. at 478, 68 P.2d at 462 (by implication); *McNeill v. Allen*, 35 Colo. App. 317, 534 P.2d 813 (1975). Paragraph 5: *Cahill*, 85 Colo. at 16, 273 P. at 656 (by implication); *Bohe v. Scott*, 83 Colo. 374, 265 P. 694 (1928). Paragraph 6: *Ackmann v. Merchs. Mortg. & Trust Corp.*, 645 P.2d 7 (Colo. 1982) (fraud as a defense to breach of contract and as basis of claim for rescission and restitution).

2. This instruction is also supported by 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.14 (3d ed. 2006); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106 (5th ed. 1984).

3. In a deceit action, a person may have a duty to disclose a material fact only if the person knows that fact. *Johnson v. Graham*, 679 P.2d 1090 (Colo. App. 1983), *rev'd in part on other grounds sub nom. Tri-Aspen Constr. Co. v. Johnson*, 714 P.2d 484 (Colo. 1986). It is not sufficient that one should have known the fact as a reasonably prudent person. *See Denver Bus. Sales Co. v. Lewis*, 148 Colo. 293, 365 P.2d 895 (1961) (specifically rejecting the reasonable care standard suggested in *Cohen*, 141 Colo. at 446, 349 P.2d at 367).

4. The following cases have concluded that no duty existed in the context of particular relationships: **Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP**, 2018 CO 54, ¶ 57, 420 P.3d 223 (law firm did not owe a duty to disclose its client's identity to a counterparty in an asset purchase); **Mallon Oil Co.**, 965 P.2d at 112 (there was no special relationship or improper acquisition of information that would create duty on the part of geologist to disclose information about minerals on seller's property); **Barfield v. Hall Realty, Inc.**, 232 P.3d 286 (Colo. App. 2010) (section 12-61-807, C.R.S., expressly provides that agent acting as real estate "transaction broker" has no duty to investigate whether property could be used as RV park or to verify accuracy of seller's representations, and failure to do so could not be basis for negligent misrepresentation or fraud claim); **Mullen v. Allstate Ins. Co.**, 232 P.3d 168 (Colo. App. 2009) (insurer has no duty to disclose nature of policies offered by other insurers); **Poly Trucking, Inc. v. Concentra Health Servs., Inc.**, 93 P.3d 561 (Colo. App. 2004) (trucking company had no duty to disclose intent to sue doctor during negotiations for the release of other claims against doctor's employer).

5. A duty to disclose may be found in the context of the particular facts of the case. *See* **Bair v. Pub. Serv. Employees Credit Union**, 709 P.2d 961 (Colo. App. 1985) (lender requiring insurance of creditor has duty to disclose what kind of insurance is required).

6. In a nondisclosure claim against a home seller, there is an independent duty to disclose latent defects known to the seller. Further, "the disclosure terms in [a] Form Contract do not subsume a home seller's common law duty to disclose such defects . . . ." **In re Estate of Gattis**, 2013 COA 145, ¶ 32, 318 P.3d 549, 557.

**19:6 CONCEALMENT—DEFINED**

The defendant, *(name)*, concealed a fact that (he) (she) knew, if, by conduct, or by written or oral words, or by a combination of conduct and words, (he) (she) created a false impression of the actual fact in the mind of the plaintiff, *(name)*:

(1. By covering up the truth) (or)

(2. By preventing the plaintiff from discovering the actual fact for [himself] [herself]).

**Notes on Use**

1. When appropriate, this instruction should be used with Instruction 19:2.

2. This instruction covers the situation where it is claimed that the defendant, instead of failing to disclose a material fact that the defendant had a duty to disclose, took affirmative steps to mislead another by covering up a material fact or by making it difficult for the other person to discover the truth about a material fact, as for example, setting a speedometer back on a used car. Use only those parenthesized and bracketed portions of this instruction that are appropriate to the evidence.

3. If the false representation was allegedly made to someone other than the plaintiff, then this instruction must be appropriately modified.

**Source and Authority**

1. This instruction is supported by the broad language of **Meredith v. Ramsdell**, 152 Colo. 548, 384 P.2d 941 (1963), and by 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.14 (3d ed. 2006); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS § 550 (1977).

2. No Colorado cases have been found involving affirmative acts of concealment. However, the spirit of the nondisclosure cases, *see* Source and Authority to Instruction 19:5, supports this instruction. In those cases, where the courts used the word “concealment,” they were referring to a knowing nondisclosure of a material fact that the speaker was under a duty to disclose rather than an affirmative act of concealment.

## 19:7 FALSE REPRESENTATION—RELIANCE— DEFINED

The plaintiff, (*name*), relied on the claimed representation if (he) (she) believed it was true, and based on that representation:

(1. Took action [he] [she] otherwise would not have taken) (or)

(2. Decided not to take action [he] [she] otherwise would have taken.)

### Notes on Use

1. This instruction has been prepared for those cases where the misrepresentation is overt and Instruction 19:1 is used. When the misrepresentation is by way of concealment or nondisclosure, the requirement of reliance is adequately explained in Instruction 19:2 (numbered paragraph 5).

2. Use only those parenthesized or bracketed portions of this instruction that are appropriate to the evidence.

### Source and Authority

1. The language of this instruction is supported by **Teare v. Sussman**, 120 Colo. 488, 210 P.2d 446 (1949), which appears to be in accord with cases from other jurisdictions. See 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.13 (3d ed. 2006); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108 (5th ed. 1984). The plaintiff need not be compelled to act because of the misrepresentation; it is sufficient if the plaintiff is induced to act or refrain from acting.

2. The plaintiff must have believed the representation was true. **Sears v. Hicklin**, 13 Colo. 143, 21 P. 1022 (1889) (rescission action); HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 7.13; PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 108. *But see* **Fitzgerald v. McDonald**, 81 Colo. 413, 255 P. 989 (1927) (in false representation case, plaintiff's belief in truth of defendant's statement not required when plaintiff acted as if he accepted the truth of the statement).

3. In a deceit action, the plaintiff's reliance constitutes the causal connection between the defendant's alleged improper conduct and the plaintiff's claimed damages. While in some cases there is language suggesting that, before reliance can exist, the alleged misrepresentation must have been virtually the sole and only cause of the transaction, *see, e.g.*, **Wheeler v. Dunn**, 13 Colo. 428, 22 P. 827 (1889), in **Morrison v.**

**Goodspeed, 100 Colo. 470, 68 P.2d 458 (1937)**, it was suggested that it was sufficient if the misrepresentation "might" have influenced the transaction.

## 19:8 JUSTIFIABLE RELIANCE ON FALSE REPRESENTATION—DEFINED

A person is justified in assuming that a representation is true if a person of the same or similar intelligence, education, or experience would rely on that representation.

### Notes on Use

1. This instruction should be appropriately modified when the person to whom the representation was made was of less than normal intelligence, education, or experience.

2. This instruction should be used in conjunction with Instruction 19:1. When the alleged deceit is based on a concealment or nondisclosure, *see* Instruction 19:2, Instruction 19:9 should be used in place of this instruction.

### Source and Authority

1. This instruction is supported by **Zimmerman v. Loose**, 162 Colo. 80, 425 P.2d 803, 807 (1967) (A chronic alcoholic's reliance was justified even though defendants claimed that his actions were not that of a reasonably prudent person; "[t]he court must consider each case on its own merits as to the particular individual, his mentality, awareness and experience, in determining his ability and right to rely."); **Foster v. O'Farrell**, 75 Colo. 170, 225 P. 217 (1924) (error to instruct that plaintiff's reliance had to be that of a person of ordinary prudence, especially where plaintiff was ignorant and unable to read or write more than his own name); **Patterson v. BP America Production Co.**, 2015 COA 28, ¶ 70, 360 P.3d 211 (jury instruction properly explained that proving a fraudulent concealment claim based on ignorance requires plaintiff to show "ignorance" of the "material facts" giving rise to the claim); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS §§ 7.8-7.12 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108 (5th ed. 1984). *See also* authorities cited in Source and Authority to Instruction 19:10.

2. There is authority for the proposition that if the plaintiff has access to information that would have led to the discovery of the facts and that information was equally available to both parties, then plaintiff's reliance is not justified or reasonable as a matter of law. *See Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.*, 251 P.3d 9 (Colo. App. 2010); **Balkind v. Telluride Mtn. Title Co.**, 8 P.3d 581 (Colo. App. 2000); *see also* **Vinton v. Virzi**, 2012 CO 10, ¶ 17, 269 P.3d 1242; **M.D.C./Wood, Inc. v. Mortimer**, 866 P.2d 1380 (Colo. 1994). However, for a different test, *see* the authority cited in the Source and Authority to this instruction and to Instructions 19:9 and 19:10.

## 19:9 JUSTIFIABLE RELIANCE—NONDISCLOSURE OR CONCEALMENT—DEFINED

When dealing with someone else, a person is justified in assuming that the other person will not intentionally (fail to disclose a past or present material fact which the other person knows and has a duty to disclose) (conceal a material fact).

However, a person is not justified in relying on this assumption when someone of the same or similar intelligence, education, or experience would not rely on it.

### Notes on Use

1. This instruction should be appropriately modified when the person to whom the representation was made was of less than normal intelligence, education, or experience. *See* Source and Authority to Instruction 19:8.

2. This instruction should be used with Instruction 19:2. When the alleged deceit is based on an overt misrepresentation, *see* Instruction 19:1, Instruction 19:8 should be used in place of this instruction.

### Source and Authority

1. This instruction is supported by necessary implication by the authorities cited in the Source and Authority to Instructions 19:8 and 19:10. *See also* **Glisan v. Smolenske**, 153 Colo. 274, 387 P.2d 260 (1963) (plaintiff not entitled to recover where undisclosed material fact was patent).

2. “Direct evidence of reliance [in a] fraudulent concealment [case] is not required.” It “may be inferred from circumstantial evidence.” **Kopeikin v. Merchs. Mortg. & Trust Corp.**, 679 P.2d 599, 602 (Colo. 1984).

3. In a class action context “the inference of reliance based on uniform nondisclosure can be rebutted with evidence of other explanations for the putative class members’ behavior.” Circumstantial evidence may be introduced to refute reliance inference and deny class certification.” **Maxwell v. United Servs. Auto. Ass’n**, 2014 COA 2, ¶ 29, 342 P.3d 474.

4. In a fraudulent concealment claim, an exculpatory clause may preclude reasonable reliance on nondisclosure if the clause explains

why certain inferences should not be drawn. *See Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.*, 251 P.3d 9 (Colo. App. 2010).

5. There is authority for the proposition that if the plaintiff has access to information that would have led to the discovery of the facts and that information was equally available to both parties, then plaintiff's reliance is not justified or reasonable as a matter of law. *See Colo. Coffee Bean, LLC*, 251 P.3d at 18; *Balkind v. Telluride Mtn. Title Co.*, 8 P.3d 581 (Colo. App. 2000); *see also Vinton v. Virzi*, 2012 CO 10, ¶ 17, 269 P.3d 1242; *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380 (Colo. 1994). However, for a different test, see the authority cited in the Source and Authority to this instruction and to Instructions 19:8 and 19:10.

## 19:10 JUSTIFIABLE RELIANCE—NO GENERAL DUTY TO INVESTIGATE

A person's reliance is justified even though (he) (she) did not make an investigation that would have revealed the facts unless:

1. (He) (she) knew specific facts that would have caused a person of the same or similar intelligence, education or experience to be suspicious and investigate; and
2. (He) (she) had a reasonable opportunity to investigate.

### Notes on Use

1. When appropriate, this instruction should be used in conjunction with Instruction 19:8 or Instruction 19:9.

2. When appropriate, a more suitable word such as "examination" may be substituted for the word "investigation."

3. This instruction and the concept of "inquiry notice" that it embodies do not apply to a claim that an antenuptial agreement was unenforceable based upon the deceased spouse's fraud, concealment, and failure to make "fair disclosure." **In re Estate of Lebsock**, 44 Colo. App. 220, 618 P.2d 683 (1980) (citing section 15-11-204, C.R.S.). The duty of fair disclosure with regard to premarital agreements is now addressed in section 14-2-309, C.R.S.

4. There is authority for the proposition that if the plaintiff has access to information that would have led to the discovery of the true facts and such information was equally available to both parties, then plaintiff's reliance is not justified or reasonable as a matter of law. See **Colo. Coffee Bean, LLC v. Peaberry Coffee, Inc.**, 251 P.3d 9 (Colo. App. 2010); **Balkind v. Telluride Mtn. Title Co.**, 8 P.3d 581 (Colo. App. 2000); see also **Vinton v. Virzi**, 2012 CO 10, ¶ 17, 269 P.3d 1242; **M.D.C./Wood, Inc. v. Mortimer**, 866 P.2d 1380 (Colo. 1994). However, for a different test, see the authority cited in the Source and Authority to Instructions 19:8 to 19:10.

### Source and Authority

1. This instruction is supported by **Sellar v. Clelland**, 2 Colo. 532, 545 (1875) ("[A] man to whom a particular and distinct representation has been made is entitled to rely on the representation, and need not

make any further inquiry. He is not bound to inquire, unless something has happened to excite suspicion, or unless there is something in the case, or in the terms of the representation, to put him on inquiry”; it is no defense that the party receiving the incorrect statement was negligent in not making an inquiry.). *See also Nielson v. Scott*, 53 P.3d 777, 780 (Colo. App. 2002) (“If the circumstances surrounding a transaction would arouse a reasonable person’s suspicion, then equity will not relieve a party from the consequences of inattention and negligence in failing to pursue an investigation.” (citing *Brassford v. Cook*, 152 Colo. 136, 380 P.2d 907 (1963))).

2. Other Colorado cases that also support this instruction include *Hayden v. Perry*, 110 Colo. 347, 351, 134 P.2d 212, 214 (1943) (“where one party to a transaction induces the other party to enter it by willful misrepresentations, the representor cannot escape liability for his fraud by claiming that the representee could have investigated the representations made and would then have found that they were untrue”); *Pattridge v. Youmans*, 107 Colo. 122, 126, 109 P.2d 646, 648 (1941) (“However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defense to the other.” (quoting *Sellar*, 2 Colo. at 545)); *Bucci v. Pizza*, 90 Colo. 30, 31, 6 P.2d 5, 5 (1931) (where parties were friends, “[p]laintiff’s credulity and lack of greater diligence does not absolve defendant from the consequences of his misrepresentations”); *Masser v. Foxworthy*, 86 Colo. 313, 281 P. 360 (1929) (plaintiff who was 65, ignorant, and chronic asthmatic had no duty to investigate condition of property where defendant made false representations about it); *Schtul v. Wilson*, 83 Colo. 528, 266 P. 1112 (1928) (not error to deny instruction saying plaintiff had duty to investigate); *Colorado Mortgage Co. v. Wilson*, 83 Colo. 254, 263 P. 406 (1928) (negligence of old and inexperienced plaintiffs who failed to examine promissory notes no excuse for defendant’s deceit); *American National Bank of Denver v. Hammond*, 25 Colo. 367, 371-72, 55 P. 1090, 1091 (1898) (“There was nothing in the transaction, nor does [plaintiff] appear to have possessed any information, which would have aroused his suspicions, or cast doubt upon the truth of the statements claimed to have been made . . . and he was therefore justified in relying upon them.”); *Zang v. Adams*, 23 Colo. 408, 412, 48 P. 509, 511 (1897) (“Where a willful wrong has been committed, courts are not keen to find an avenue of escape for the wrongdoer, merely because the victim has been unsuspecting.”); *Sears v. Hicklin*, 13 Colo. 143, 21 P. 1022 (1889) (no duty where parties in a confidential relationship); *Herefort v. Cramer*, 7 Colo. 483, 4 P. 896 (1884) (no duty where information was peculiarly within the misrepresentor’s knowledge); and *Barfield v. Hall Realty, Inc.*, 232 P.3d 286 (Colo. App. 2010) (agent acting as real estate “transaction broker” has no duty to investigate whether property could be used as RV park or to verify accuracy of seller’s representations, and failure to do so could not be basis for negligent misrepresentation or fraud claim).

3. The court stated as dictum in *Sellar*, 2 Colo. at 544: “When the means of knowledge are at hand, and equally available to both parties,

and the subject about which the representations are made is open to their inspection, if the party to whom the representations are made does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived.” Colorado cases have expressly or impliedly approved this rule, but not all have noted that the dictum as originally stated was in reference to matters that were patent. *See Colo. Coffee Bean, LLC*, 251 P.3d at 19 (publicly available and equally accessible store profit information prevents a claim that nondisclosure of net losses at some company stores is unreasonable); *see also Vinton*, 2012 CO 10, ¶ 17 (a recorded deed of title is precisely the kind of information that is equally accessible); *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d at 1382 (where both parties had equal access to information that would have led to true facts, reliance not justified); *Bassford v. Cook*, 152 Colo. 136, 380 P.2d 907 (1963) (where rescission action is based on innocent misrepresentation as opposed to a fraudulent one, and plaintiffs have been put on notice by facts known to them, no relief if they were negligent in not making further inquiry); *Cherrington v. Woods*, 132 Colo. 500, 290 P.2d 226 (1955) (recovery not allowed where plaintiffs made partial inspection and information was immediately before them because notice that excites attention, puts party on guard, and calls for inquiry, is sufficient notice for a reasonable inquiry); *Ringsby v. Timpfe*, 105 Colo. 356, 98 P.2d 287 (1939) (rule approved in dictum where insufficient evidence of reliance); *Bosick v. Youngblood*, 95 Colo. 532, 37 P.2d 1095 (1934) (rule approved in dictum, and supreme court held there was no reliance because plaintiff made own inspection and was relying on it); *Troutman v. Stiles*, 87 Colo. 597, 290 P. 281 (1930) (applied dictum in *Sellar*, and concluded that plaintiff made a partial examination); *Jasper v. Bicknell*, 62 Colo. 318, 162 P. 144 (1916) (rule approved in dictum, but held not to be applicable).

4. In support of the general rule that one may rely on a deliberately made, false representation without making an independent investigation even though a reasonable man might not, see 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.12 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108 (5th ed. 1984).

**19:11 RELIANCE AFTER INVESTIGATION**

**The defendant's (representation) (or) (concealment of a material fact) is not the cause of plaintiff's damages if the plaintiff substantially relied and acted on (his) (her) own investigation rather than on the defendant's (representation) (or) (concealment).**

**Notes on Use**

This instruction should be used only when there is some evidence in the case that the plaintiff may have made his or her own investigation or examination. When applicable, this instruction should be given with Instruction 19:8 or 19:9.

**Source and Authority**

This instruction is supported by **Greathouse v. Jones**, 167 Colo. 406, 447 P.2d 985 (1968); **Brannan v. Collins**, 89 Colo. 492, 4 P.2d 684 (1931); **Nelson v. Van Schaack & Co.**, 87 Colo. 199, 286 P. 865 (1930); **Johnson v. Graham**, 679 P.2d 1090 (Colo. App. 1983), *rev'd in part on other grounds sub nom. Tri-Aspen Construction Co. v. Johnson*, 714 P.2d 484 (Colo. 1986); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.13 (3d ed. 2006); and W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108 (5th ed. 1984). *See also Cohen v. Vivian*, 141 Colo. 443, 349 P.2d 366 (1960) (inspection which did not reveal to the plaintiffs a latent defect which the defendant was under a duty to disclose does not absolve defendant).

## 19:12 STATEMENTS OF FUTURE INTENTION OR PROMISES AS FALSE REPRESENTATIONS

(A promise to do something in the future is a false representation if the person making the promise did not intend to keep the promise when (he) (she) made it.)

(A statement of intent to do something in the future is a false representation if the person making the statement did not intend to do it when (he) (she) made the statement.)

### Notes on Use

1. Use whichever parenthesized phrases are appropriate.
2. When appropriate, this instruction should be given with Instruction 19:3.

### Source and Authority

This instruction is supported by **Brody v. Bock**, 897 P.2d 769 (Colo. 1995) (promise concerning future event coupled with present intention not to fulfill promise is actionable as fraud); **Ballow v. PHICO Insurance Co.**, 875 P.2d 1354 (Colo. 1993); **Kinsey v. Preeson**, 746 P.2d 542 (Colo. 1987); **H & H Distributors, Inc. v. BBC International, Inc.**, 812 P.2d 659 (Colo. App. 1990); **State Bank of Wiley v. States**, 723 P.2d 159, 160 (Colo. App. 1986) (“[f]raud cannot be predicated upon the mere non-performance of a promise or contractual obligation . . . or upon failure to fulfill an agreement to do something at a future time”); **Stalos v. Booras**, 34 Colo. App. 252, 528 P.2d 254 (1974); and **Teare v. Sussman**, 120 Colo. 488, 491, 210 P.2d 446, 447 (1949) (“[w]here a present intention, even though as to future conduct, is predicated upon or evidenced by false statements as to existing facts, such statements, if relied on, constitute actionable fraud”).

## 19:13 STATEMENTS ABOUT THE FUTURE AS FALSE REPRESENTATIONS

A statement about what (will) (or) (will not) happen in the future is a false representation only if it turns out to be false and the person making the statement:

(1. Claimed to have special knowledge to support the statement that he or she did not have;) (or)

(2. Had special knowledge that he or she failed to disclose and that he or she knew would make the future event unlikely to happen).

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. When appropriate, this instruction should be given with Instruction 19:3.
3. When the statement about the future relates to the defendant's conduct, Instruction 19:12 should be used rather than this instruction.

### Source and Authority

This instruction, stating the general rule that a false statement about a future event does not constitute an actionable misrepresentation, is supported by **Ackmann v. Merchants Mortgage & Trust Corp.**, 645 P.2d 7 (Colo. 1982) (fraud as defense to breach of contract and rescission and restitution); **United Fire & Casualty Co. v. Nissan Motor Corp.**, 164 Colo. 42, 433 P.2d 769 (1967); **Leece v. Griffin**, 150 Colo. 132, 371 P.2d 264 (1962); **Bell Press, Inc. v. Phillips**, 147 Colo. 461, 364 P.2d 398 (1961) (fraud as defense to breach of contract); and **Burman v. Richmond Homes, Ltd.**, 821 P.2d 913 (Colo. App. 1991) (statement that is only an expression of opinion about the happening of a future event is not actionable fraud). The exceptions to the general rule are supported by 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.10 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 109 (5th ed. 1984).

## 19:14 STATEMENTS OF LAW AS FALSE REPRESENTATIONS

A statement about the law is an expression of opinion and is not a false representation of fact.

### Notes on Use

None.

### Source and Authority

1. This instruction is supported by 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.8 (3d ed. 2006); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 109 (5th ed. 1984); **Chacon v. Scavo**, 145 Colo. 222, 358 P.2d 614 (1960); **Seal v. Hart**, 755 P.2d 462 (Colo. App. 1988); and **Kunz v. Warren**, 725 P.2d 794 (Colo. App. 1986).

2. There may be an issue as to whether a statement is a statement of law or fact. **Brodeur v. Am. Home Assurance Co.**, 169 P.3d 139 (Colo. 2007); **Feit v. Donahue**, 826 P.2d 407 (Colo. App. 1992); **Two, Inc. v. Gilmore**, 679 P.2d 116 (Colo. App. 1984).

3. The general rule set forth in this instruction is subject to certain qualifications such as special knowledge possessed by one and not available to the other, a fiduciary relationship, and representations as to the law of a foreign state. **Brodeur**, 169 P.3d at 154; **Metzger v. Baker**, 93 Colo. 165, 24 P.2d 748 (1933).

## 19:15 STATEMENTS OF OPINION AS FALSE REPRESENTATIONS

**A statement that is made and reasonably understood to be only an opinion is not a false representation of a past or present fact.**

**However, a statement in the form of an opinion is a false representation of a past or present fact if:**

**1. The statement is intended by the speaker and reasonably understood by the listener to be a statement of a past or present fact; and**

**2. The statement is false.**

### Notes on Use

1. When appropriate, this instruction should be given with Instruction 19:3.

2. This instruction is intended primarily for use in two situations: (1) where the statement of the defendant might or might not reasonably be considered one of fact or opinion and the court cannot say as a matter of law that it is a statement of opinion, and (2) where the plaintiff has charged the defendant with having made several false statements, both of fact and of opinion, and those statements of opinion are, under the particular circumstances, insufficient to support a claim for relief from deceit. In the latter case, if appropriate, the court should add to this instruction by specifying those particular statements of opinion on which the jury may not base a verdict.

### Source and Authority

1. The first paragraph of this instruction is supported by **Knight v. Cantrell**, 154 Colo. 396, 390 P.2d 948 (1964).

2. The second paragraph of this instruction is supported by **Powell v. Landis**, 95 Colo. 375, 36 P.2d 462 (1934) (misrepresentation as to weekly profits of a business); **Lesser v. Porter**, 94 Colo. 348, 30 P.2d 318 (1934) (misrepresentation of market value of farm); **Cahill v. Readon**, 85 Colo. 9, 273 P. 653 (1928) (misrepresentation of rental value of property); **Lewis v. Winslow**, 77 Colo. 95, 98, 234 P. 1070, 1071 (1925) ("representations of value, or cost or quality, of property, if made with the purpose of having them accepted by the party to whom they are made, as of fact, and so relied upon, are to be treated as representations of fact"); **Highfill v. Ermence**, 73 Colo. 478, 216 P. 533

(1923) (misrepresentation that lease could be extended); and **American National Bank of Denver v. Hammond**, 25 Colo. 367, 372, 55 P. 1090, 1091-92 (1898) (In a case involving misrepresentation of the value of corporate stock, the supreme court held: "The true rule appears to be that a fraudulent misrepresentation cannot itself be the mere expression of an opinion entertained by the party making it; but where such party makes a statement which might otherwise be only an opinion, and does not state it as the mere expression of his opinion, but affirms it as a fact . . . so that the person to whom it is addressed may reasonably treat it as a fact . . ., then such statement becomes an affirmation of fact, within the meaning of the general rule, and may be a fraudulent misrepresentation.").

3. Also supporting this instruction are **Ballow v. PHICO Insurance Co.**, 875 P.2d 1354 (Colo. 1993); **Colorado Interstate Gas Co. v. Chemco, Inc.**, 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS §§ 7.8, 7.11 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 109 (5th ed. 1984).

4. Where a statement can reasonably be construed as an opinion or a representation of fact, it is for the jury to decide which it is. **Lesser**, 94 Colo. at 350, 30 P.2d at 319; **Highfill**, 73 Colo. at 480, 216 P. at 533; **Hammond**, 25 Colo. at 372, 55 P. at 1092.

## 19:16 AFFIRMATIVE DEFENSE—WAIVER BY PLAINTIFF BEFORE PLAINTIFF'S COMPLETE PERFORMANCE

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of deceit based on fraud if the affirmative defense of waiver is proved. This defense is proved if you find both of the following:

1. The plaintiff learned the actual facts after (he) (she) began [*insert description of course of action*], but before (he) (she) completed [*insert description of course of action*]; and

2. The plaintiff continued [*insert description of course of action*] with full knowledge of the actual facts when a reasonable person under the same or similar circumstances would not have done so.

### Notes on Use

Use whichever parenthesized words are appropriate.

### Source and Authority

1. This instruction is supported by **Tisdell v. Central Sav. Bank & Trust Co.**, 90 Colo. 114, 6 P.2d 912 (1931) (fraud as defense to breach of contract); **Lewis v. Carsh**, 79 Colo. 51, 244 P. 598 (1926); **Ponder v. Altura Farms Co.**, 57 Colo. 519, 143 P. 570 (1914).

2. For an effective waiver, the plaintiff must have elected to continue after receiving full knowledge of the true facts. **Holland Furnace Co. v. Robson**, 157 Colo. 347, 402 P.2d 628 (1965); **Elk River Assocs. v. Huskin**, 691 P.2d 1148 (Colo. App. 1984); **Adams v. Paine, Webber, Jackson & Curtis, Inc.**, 686 P.2d 797 (Colo. App. 1983), *aff'd on other grounds*, 718 P.2d 508 (Colo. 1986). Even with full knowledge, continuing performance does not constitute a waiver if, under the circumstances, a reasonably prudent person would have done so. **Sellar v. Clelland**, 2 Colo. 532 (1875).

3. If the plaintiff learned of the actual facts before the plaintiff took any action in reliance, for example, entering into a contract with another person, then the plaintiff's claim must fail not because of waiver but because the plaintiff cannot meet his or her own burden of proof on the issue of reliance. See Instructions 19:7 and 19:11.

## 19:17 ACTUAL DAMAGES

**Plaintiff, (*name*), has the burden of proving the nature and extent of (his) (her) damages by a preponderance of the evidence. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the (*insert appropriate description, e.g., "false representation[s]" or "deceit"*) of the defendant(s), (*name[s]*), (and the [*insert appropriate description, e.g., "negligence"*], if any, of any designated nonparties).**

**In determining these damages, you shall consider the following:**

**(1. The difference between the market value of the property and what its value would have been had the representation been true) (and)**

**(2. [*Insert any other consequential damages the jury might reasonably find the plaintiff sustained as a proximate result of the defendant's false representation, concealment or nondisclosure.*]).**

### Notes on Use

1. Use whichever parenthesized portions are appropriate.

2. Paragraph 1 states the proper measure of damages in the typical contract situation where the plaintiff has suffered actual damages in the sense that the plaintiff has given something of value by performing the contract.

3. Under Paragraph 2, in a contract situation, the plaintiff may also recover any consequential damages which were the proximate result of his or her reliance. For example, a plaintiff who bought a warehouse falsely represented as being fireproof could recover the difference in value between a fireproof and a nonfireproof warehouse under Paragraph 1, and if, in reliance, the plaintiff also stored goods in the warehouse which subsequently burned, destroying the goods, the plaintiff could also recover their value under Paragraph 2. If the plaintiff has been induced to part with something of value in a non-contract situation, for example, making a gift of money to a third person, recovery would be had under Paragraph 2, and Paragraph 1 should be omitted.

In the typical contract case, where plaintiff's principal recovery will be under Paragraph 1, the plaintiff cannot under Paragraph 2 also recover what the plaintiff may have given as his or her performance under the contract, since by suing in deceit the plaintiff has affirmed the contract.

4. When Paragraph 2 is given, the consequential damages the plaintiff may be entitled to recover should be identified with some specificity, and care should be taken that such damages, as described, do not include any damages recoverable under Paragraph 1. *See Forsyth v. Associated Grocers of Colo., Inc.*, 724 P.2d 1360 (Colo. App. 1986).

5. As an alternative to the "out of bargain" rule set out as Paragraph 1, the court, in a deceit case involving deterioration of a house because of a concealed defect, approved the measure of damages as being the cost to the plaintiff of putting "the property in the condition that would bring it into conformity with the value of the property as it was represented." *Carpenter v. Donohoe*, 154 Colo. 78, 81, 388 P.2d 399, 401 (1964); *accord Slack v. Sodal*, 190 Colo. 411, 547 P.2d 923 (1976); *see also McNeill v. Allen*, 35 Colo. App. 317, 534 P.2d 813 (1975).

### Source and Authority

1. The "out of bargain" rule, set out in Paragraph 1, is supported by *Ballow v. PHICO Insurance Co.*, 878 P.2d 672 (Colo. 1994) (measure of damages in both breach of contract actions and tort actions for fraud involving contract between the parties is "benefit of bargain" rule); *Trimble v. City & County of Denver*, 697 P.2d 716 (Colo. 1985); *Greathouse v. Jones*, 158 Colo. 516, 408 P.2d 439 (1965); *Corder v. Laws*, 148 Colo. 310, 366 P.2d 369 (1961); *Shirley v. Merritt*, 147 Colo. 301, 364 P.2d 192 (1961); *Otis & Co. v. Grimes*, 97 Colo. 219, 48 P.2d 788 (1935) (specifically rejecting the "out of pocket" rule approved in two earlier cases); *Herefort v. Cramer*, 7 Colo. 483, 4 P. 896 (1884); *Club Matrix, LLC v. Nassi*, 284 P.3d 93 (Colo. App. 2011); *Black v. First Federal Savings & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992) (recognizing "benefit of bargain" rule, but concluding that proper measure of damages for fraudulently inducing bank to lend money was amount lent plus interest), *aff'd on other grounds sub nom. La Plata Medical Center Associates v. United Bank of Durango*, 857 P.2d 410 (Colo. 1993); *Feit v. Donahue*, 826 P.2d 407 (Colo. App. 1992); *Harrison v. Smith*, 821 P.2d 832 (Colo. App. 1991); *Colorado Performance Corp. v. Mariposa Associates*, 754 P.2d 401 (Colo. App. 1987) (illustrating application of rule in a nondisclosure case); and *Elk River Associates v. Huskin*, 691 P.2d 1148 (Colo. App. 1984).

2. For illustrations of the kind of consequential damages the plaintiff may or may not be able to recover under Paragraph 2, see *Teare v. Sussman*, 120 Colo. 488, 210 P.2d 446 (1949); *Chandler v. Ziegler*, 88 Colo. 1, 291 P. 822 (1930); *Intermountain Lumber Co. v. Radetsky*, 75 Colo. 570, 227 P. 564 (1924); *Flora v. Hoeft*, 71 Colo. 273, 206 P. 381 (1922); *Peppers v. Metzler*, 71 Colo. 234, 205 P. 945

(1922); **American National Bank of Denver v. Hammond**, 25 Colo. 367, 55 P. 1090 (1898); **Sellar v. Clelland**, 2 Colo. 532 (1875); **Club Matrix, LLC**, 284 P.3d at 96; **Feit**, 826 P.2d at 413; **Russell v. First American Mortgage Co.**, 39 Colo. App. 360, 565 P.2d 972 (1977); **McNeill**, 35 Colo. App. at 326, 534 P.2d at 819-20; **Wagner v. Dan Unfug Motors, Inc.**, 35 Colo. App. 102, 529 P.2d 656 (1974); and **Stamp v. Rippe**, 29 Colo. App. 185, 483 P.2d 420 (1971).

3. Actual damages are a necessary element of the plaintiff's cause of action in deceit. **W. Cities Broad., Inc. v. Schueller**, 849 P.2d 44 (Colo. 1993); **Sposato v. Heggs**, 123 Colo. 553, 233 P.2d 385 (1951); **Slide Mines, Inc. v. Denver Equip. Co.**, 112 Colo. 285, 148 P.2d 1009 (1944); **N. Am. Sav. & Loan Ass'n v. Phillips**, 94 Colo. 554, 31 P.2d 492 (1934); **Hart v. Zaitz**, 72 Colo. 315, 211 P. 391 (1922); **Dann v. Perrotti & Hauptman Dev. Co.**, 670 P.2d 448 (Colo. App. 1983) (When not only the amount of damages is uncertain, but the fact of damages is uncertain as well, there can be no recovery for deceit.).

4. Damages, to be recoverable, must have been a proximate result of the plaintiff's reliance on the false representation. **Intermountain Lumber Co.**, 75 Colo. at 573, 227 P. at 565 ("natural and obvious"); **Flora**, 71 Colo. at 274, 206 P. at 381 ("directly and proximately"); **Hammond**, 25 Colo. at 374, 55 P. at 1092 ("natural and proximate consequences"); **Sellar**, 2 Colo. at 551 ("fairly and directly the result").

5. Noneconomic damages for mental suffering and emotional distress may be awarded on a claim for fraudulent concealment even though recovery of such damages is generally not available in connection with an injury to property. **Anson v. Trujillo**, 56 P.3d 114 (Colo. App. 2002).

6. When the plaintiff rescinds a contract because of fraud and seeks restitution of the consideration paid, rather than affirming the contract and suing for damages in deceit, the plaintiff cannot recover exemplary damages. **Dodds v. Frontier Chevrolet Sales & Serv., Inc.**, 676 P.2d 1237 (Colo. App. 1983).

## **CHAPTER 20. ASSAULT AND BATTERY**

### **A. ASSAULT**

- 20:1 Elements of Liability
- 20:2 Apprehension—Defined
- 20:3 Intent to Place Another in Apprehension—Defined
- 20:4 Actual or Nominal Damages

### **B. BATTERY**

- 20:5 Elements of Liability
- 20:6 Contact—Defined
- 20:7 Intent—Defined
- 20:8 Transferred Intent
- 20:9 Actual or Nominal Damages

### **C. AFFIRMATIVE DEFENSES**

- 20:10 Words Alone Do Not Justify
- 20:11 Consent
- 20:12 Self-Defense of Person
- 20:13 Self-Defense—Force Calculated to Inflict Death or Serious Bodily Injury
- 20:14 Defense of Another Person
- 20:15 Battery Defenses—Defense of Real Property
- 20:16 Battery Defenses—Defense of Personal Property
- 20:17 Battery Defenses—Recapture of Personal Property

**A. ASSAULT****20:1 ELEMENTS OF LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of assault, you must find that all of the following have been proved by a preponderance of the evidence:

1. The defendant intended to cause an offensive or harmful physical contact with the plaintiff or intended to place the plaintiff in apprehension of such contact; and

2. The defendant placed the plaintiff in apprehension of immediate physical contact; and

(3. That contact [was] [appeared to be] [harmful] [or] [offensive].)

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

**Notes on Use**

1. Omit any numbered paragraph the facts of which are not in

dispute, and make such other changes as are necessary in such circumstances to make the instruction understandable.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. Use whichever parenthesized or bracketed words are appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

4. In some circumstances, for a “contact” to be actionable, whether as a threatened one for an assault or as an actual one for a battery, it need not be “harmful” or “offensive.” See, e.g., **Bloskas v. Murray**, 646 P.2d 907 (Colo. 1982). In such cases, the parenthesized numbered paragraph 3 of this instruction, as well as the parenthesized definitions of “harmful” and “offensive” in Instruction 20:6, when that instruction is given with this instruction, must be omitted.

5. Though mitigation of damages is an affirmative defense, see Instruction 5:2, it is rarely a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

6. Other appropriate instructions defining the terms used in this instruction, for example, Instruction 20:2, defining “apprehension,” and Instruction 20:6, defining “contact,” must also be given with this instruction.

7. An assault may exist if the defendant’s intentional conduct was directed toward a third person, rather than the plaintiff. In such cases, numbered paragraph 1 should be modified accordingly. See, e.g., numbered paragraph 1 of Instruction 20:5.

8. This instruction must be appropriately modified in cases in which there is sufficient evidence that the claimed assault may have occurred under circumstances that would immunize the defendant from liability under certain conditions. See, e.g., § 13-21-108, C.R.S. (the “Good Samaritan” statute).

### Source and Authority

This instruction is supported by **White v. Muniz**, 999 P.2d 814, 819 (Colo. 2000) (for assault or battery, plaintiff must prove that defendant intended “to cause offensive or harmful consequences by his act,” but need not prove that the defendant intended the harm that actually occurred); **Horton v. Reaves**, 186 Colo. 149, 526 P.2d 304

(1974); **Adams v. Corrections Corp. of America**, 187 P.3d 1190 (Colo. App. 2008); and **Bohrer v. DeHart**, 943 P.2d 1220 (Colo. App. 1996). *See also* RESTATEMENT (SECOND) OF TORTS § 21(1) (1965); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS §§ 3.4, 3.5 (3d. ed. 2006); W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 10 (5th ed. 1984).

**20:2 APPREHENSION—DEFINED**

**Apprehension is a state of mind experienced when a person anticipates immediate harmful or offensive physical contact.**

**Notes on Use**

This instruction should be used with Instruction 20:1.

**Source and Authority**

This instruction is supported by W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 10, at 43–44 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS §§ 24, 27 (1965). *See also* **Campbell v. Jenkins**, 43 Colo. App. 458, 608 P.2d 363 (1979).

## 20:3 INTENT TO PLACE ANOTHER IN APPREHENSION—DEFINED

**A person intends to place another in apprehension of physical contact when (he) (she):**

- 1. Acts with the purpose of causing apprehension of physical contact; or**
- 2. Knows that (his) (her) conduct will probably place the other person in apprehension of physical contact.**

### Notes on Use

Where the intent may have been directed to a third person, rather than the plaintiff, this instruction should be appropriately modified.

### Source and Authority

1. This instruction is supported by **White v. Muniz**, 999 P.2d 814 (Colo. 2000). *See also* **Mooney v. Carter**, 114 Colo. 267, 160 P.2d 390 (1945); RESTATEMENT (SECOND) OF TORTS § 32 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 10, at 46 (5th ed. 1984).

2. “With regard to the intent element of the intentional torts of assault and battery . . . a plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act. The plaintiff need not prove, however, that the actor intended the harm that actually results.” **White**, 999 P.2d at 819.

**20:4 ACTUAL OR NOMINAL DAMAGES**

Plaintiff, (*name*), has the burden of proving the nature and extent of (his) (her) damages by a preponderance of the evidence. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the (*insert appropriate description, e.g., "assault" or "battery"*) of the defendant(s), (*name[s]*), (and the [*insert appropriate description, e.g., "negligence"*], if any, of any designated nonparties).

In determining these damages, you shall consider the following:

1. Any noneconomic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: physical and mental pain and suffering, inconvenience, emotional stress, fear, anxiety, embarrassment, humiliation, impairment of the quality of life, and [*insert any other recoverable noneconomic losses for which there is sufficient evidence*]. (In considering damages in this category, you shall not consider damages for [physical impairment] [or] [disfigurement], because these damages, if any, are to be considered in a separate category.)

2. Any economic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: loss of earnings or income; impairment of earning capacity; (reasonable and necessary) medical, hospital and other expenses, and [*insert any other recoverable economic losses for which there is sufficient evidence*]. (In considering damages in this category, you shall not consider damages for [physical impairment] [or] [disfigurement], since these damages, if any, are to be considered in a separate category.)

(3. Any [physical impairment] [or]

[disfigurement]. In considering damages in this category, you shall not include damages again for losses or injuries already determined in either numbered paragraph 1 or 2 above.)

If you find in favor of the plaintiff, but do not find any actual damages, you shall award (him) (her) nominal damages of one dollar.

### Notes on Use

1. Use only those numbered, parenthesized paragraphs or portions that are appropriate to the evidence in the case.

2. This instruction is also applicable to damages recoverable for a battery. In such cases the parenthesized word “battery” should be substituted for the word “assault.”

3. In some cases an appropriate instruction relating to causation may need to be given with this instruction. *See* Instructions 9:18–9:21.

4. Where there is uncontroverted evidence of actual damages, the last paragraph referring to nominal damages should be deleted. **Whitley v. Andersen**, 37 Colo. App. 486, 551 P.2d 1083 (1976), *aff’d on other grounds*, 194 Colo. 87, 570 P.2d 525 (1977).

5. Comparative negligence is not a defense to an intentional tort claim. **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (1979). Therefore, the first paragraph of this instruction varies from the comparable damage instructions in “simple” negligence cases by eliminating any reference to plaintiff’s own negligence.

### Source and Authority

1. This instruction is supported by **Jones v. Franklin**, 139 Colo. 384, 340 P.2d 123 (1959) (in an assault and battery case, instruction enumerating basically the same elements of damages approved); **Whitley**, 37 Colo. App. at 488–89, 551 P.2d at 1085; and *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 10, at 43 (5th ed. 1984).

2. Plaintiff’s words alone, “even if spoken immediately preceding the assault and battery, cannot be considered by a jury in mitigation of compensatory damages.” **Whitley**, 194 Colo. at 88, 570 P.2d at 526. They may, however, be considered in mitigation of punitive damages. *Id.*

3. In an assault action, where there is “no evidence that the fright manifested itself in any physical or mental problems [or] that any medi-

cal assistance had been sought[,]” or any other actual damages were incurred, the plaintiff is entitled to recover only nominal damages. **Campbell v. Jenkins**, 43 Colo. App. 458, 459, 608 P.2d 363, 364 (1979). For more than a nominal damage recovery based only on emotional distress, such distress must have manifested itself in some form of physical or mental illness. *Id.*

**B. BATTERY****20:5 ELEMENTS OF LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of battery, you must find that all of the following have been proved by a preponderance of the evidence:

1. The defendant's act resulted in physical contact with the plaintiff; and

2. The defendant intended to make harmful or offensive physical contact with the plaintiff (or another person) (or knew that [he] [she] would probably make such contact); and

(3. The contact was [harmful] [or] [offensive].)

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

**Notes on Use**

1. Note 4 of the Notes on Use to Instruction 20:1 also applies to this instruction.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. Omit any numbered paragraph the facts of which are not in dispute, and make such other changes as are necessary in such circumstances to make the instruction understandable.

4. Use whichever parenthesized words are appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

5. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, it is rarely a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

6. Other appropriate instructions defining the terms used in this instruction, for example, Instruction 20:6, defining “contact,” and Instruction 20:7, defining “intent,” must also be given with this instruction.

7. For cases involving persons who allegedly committed a battery while practicing one of the healing arts, see the instructions in subparts B and C of Part I of Chapter 15.

8. This instruction must be appropriately modified in cases in which there is sufficient evidence that the claimed battery may have occurred under circumstances that would immunize the defendant from liability under certain conditions. *See, e.g.*, § 13-21-108, C.R.S. (the “Good Samaritan” statute).

### Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS §§ 3.1–3.3 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9 (5th ed. 1984). *See also* **White v. Muniz**, 999 P.2d 814 (Colo. 2000); **Horton v. Reaves**, 186 Colo. 149, 526 P.2d 304 (1974); **Mooney v. Carter**, 114 Colo. 267, 160 P.2d 390 (1945); **Whitley v. Andersen**, 37 Colo. App. 486, 551 P.2d 1083 (1976), *aff’d on other grounds*, 194 Colo. 87, 570 P.2d 525 (1977).

2. In addition to the defenses set out in Part C of this chapter (Instructions 20:10 through 20:17), see section 13-80-119, C.R.S. (circumstances in which a person may not be entitled to recover damages sustained while engaged in the commission of, or during immediate flight from, an act constituting a felony (discussed in **Molnar v. Law**, 776 P.2d 1156 (Colo. App. 1989))).

3. This instruction should be appropriately modified where there is evidence that the defendant did not intend to make contact with the plaintiff or another, but did intend to put the plaintiff or another "in apprehension of a harmful or offensive bodily contact." **Hall v. McBryde**, 919 P.2d 910, 914 (Colo. App. 1996).

4. "With regard to the intent element of the intentional torts of assault and battery . . . a plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act. The plaintiff need not prove, however, that the actor intended the harm that actually results." **White**, 999 P.2d at 819.

## 20:6 CONTACT—DEFINED

**A contact is the physical touching of another person.**

**(A harmful contact is one that causes physical pain, injury, illness or emotional distress.)**

**(An offensive contact is one that would offend another's reasonable sense of personal dignity.)**

### Notes on Use

1. Note 4 of the Notes on Use to Instruction 20:1 is also applicable to this instruction.

2. Use whichever one, or both, of the parenthesized sentences in the second paragraph as is appropriate.

3. In appropriate cases, the first sentence should be modified to read: "A contact is the physical touching of another person or putting into motion anything which touches another person." In addition, in appropriate cases, the following phrase should be added to the first sentence, either as it appears in the instruction or as modified above: "or anything that is connected with or in contact with the other person." Also in appropriate cases, the first sentence should be changed to read: "A contact is the physical touching of another person or causing another person to come in contact with some physical object." See, e.g., **Mooney v. Carter**, 114 Colo. 267, 160 P.2d 390 (1945) (intentionally trying to throw plaintiff from running board of moving car by swerving the car, when the probable result would be that the plaintiff would be thrown to the ground).

### Source and Authority

This instruction is supported by the authorities cited in the Source and Authority to Instruction 20:5 and RESTATEMENT (SECOND) OF TORTS §§ 15, 19 (1965).

## 20:7 INTENT—DEFINED

A person intends to make (harmful) (or) (offensive) physical contact with someone else if (he) (she) acts with the purpose of causing such contact even if (he) (she) did not intend to cause the specific harm that actually occurred.

### Notes on Use

1. This instruction should be given with Instruction 20:5 whenever numbered paragraph 1 of that instruction is given.

2. This instruction should be appropriately modified where there is evidence that the defendant did not intend to make contact with the plaintiff or another, but did intend to put the plaintiff or another “in apprehension of a harmful or offensive bodily contact.” **Hall v. McBryde**, 919 P.2d 910, 914 (Colo. App. 1996).

### Source and Authority

1. This instruction is supported by **White v. Muniz**, 999 P.2d 814 (Colo. 2000); and **Mooney v. Carter**, 114 Colo. 267, 160 P.2d 390 (1945) (defendant had sufficient intent for battery where she intentionally sped up her car and swerved for the purpose of throwing the plaintiff from the running board, because willfully setting in motion a force which in its ordinary course would bring about the injury is sufficient). *See also Horton v. Reaves*, 186 Colo. 149, 526 P.2d 304 (1974) (in the case of a very young child, the requisite intent must include some awareness of the natural consequences of intentional acts); RESTATEMENT (SECOND) OF TORTS §§ 16, 20 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 8, 9 (5th ed. 1984).

2. “With regard to the intent element of the intentional torts of assault and battery . . . a plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act. The plaintiff need not prove, however, that the actor intended the harm that actually results.” **White**, 999 P.2d at 819.

## 20:8 TRANSFERRED INTENT

**It is not necessary that the defendant intended to make (harmful) (or) (offensive) physical contact specifically with the plaintiff.**

**Intent exists even if the defendant originally intended to make (harmful) (or) (offensive) physical contact with someone else.**

### Notes on Use

1. As to whether the parenthesized word “harmful” or “offensive” should be given, see Note 4 of the Notes on Use to Instruction 20:1.

2. This instruction should be given only when there is evidence that the defendant may have or did intend to touch the person of another, as well as, or rather than, the person of the plaintiff.

3. When this instruction is given, Instruction 20:7, defining “intent,” must also be given.

4. This instruction should be appropriately modified where there is evidence that the defendant did not intend to make contact with the plaintiff or another but did intend to put the plaintiff or another “in apprehension of a harmful or offensive bodily contact.” **Hall v. McBryde**, 919 P.2d 910, 914 (Colo. App. 1996).

### Source and Authority

1. This instruction is supported by W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 37–39 (5th ed. 1984); 1 F. HARPER ET AL. HARPER, JAMES, AND GRAY ON TORTS § 3.3, at 317–19 (3d ed. 2006); and RESTATEMENT (SECOND) OF TORTS §§ 16(2), 20(2) (1965).

2. “With regard to the intent element of the intentional torts of assault and battery . . . a plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act. The plaintiff need not prove, however, that the actor intended the harm that actually results.” **White v. Muniz**, 999 P.2d 814, 819 (Colo. 2000).

## 20:9 ACTUAL OR NOMINAL DAMAGES

### Use Instruction 20:4.

#### Note

The damages instruction for battery is the same as that for assault.

**C. AFFIRMATIVE DEFENSES****20:10 WORDS ALONE DO NOT JUSTIFY**

**Words alone do not justify an assault or battery even if they are offensive.**

**Notes on Use**

If there is evidence that an assault or battery was occasioned by an offensive or provocative gesture or gestures, this instruction should be appropriately modified.

**Source and Authority**

1. This instruction is supported by **Goldblatt v. Chase**, 121 Colo. 355, 216 P.2d 435 (1950); **W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 19**, at 126 (5th ed. 1984); and **RESTATEMENT (SECOND) OF TORTS § 31 cmt. a** (1965).

2. Words alone, “even if spoken immediately preceding the assault and battery, cannot be considered by a jury in mitigation of compensatory damages.” **Andersen v. Whitley**, 194 Colo. 87, 88, 570 P.2d 525, 526 (1977). They may, however, be considered in mitigation of exemplary damages. **Heil v. Zink**, 120 Colo. 481, 210 P.2d 610 (1949).

## 20:11 CONSENT

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (assault) (battery) if the affirmative defense of consent is proved. This defense is proved if you find all of the following:

1. The plaintiff, by words or conduct, (consented) (or) (led the defendant reasonably to believe that [he] [she] consented) to the (contact) (or) (threatened contact) by the defendant; and

2. The (contact) (or) (threatened contact) by the defendant was the same or substantially similar to that consented to by the plaintiff; and

(3. The plaintiff was capable of giving consent.)

### Notes on Use

1. Use whichever parenthesized or bracketed words are appropriate.

2. Omit numbered paragraph 3 if there is no evidence of incapacity in the case and omit either of the other numbered paragraphs if the facts are not in dispute.

3. If there is evidence of some particular reason why the plaintiff was incapable of giving consent, for example, infancy or intoxication, paragraph 3 should be included and the following should be added to this instruction: "The plaintiff was not capable of effectively consenting if at the time (*insert a brief description of any conditions which would render the plaintiff incapable of giving effective consent*)."

Similarly, if the plaintiff's consent would not be effective for some other reason, for example, because it was obtained by fraud or duress, this instruction must be appropriately modified.

4. If there is a dispute as to whether the defendant made or threatened any contact, this instruction must be appropriately modified.

5. For cases involving persons who allegedly committed a battery while practicing one of the healing arts, see the instructions in Part I of Subparts B and C of Chapter 15.

### Source and Authority

This instruction is supported by W. PAGE KEETON ET AL., PROSSER AND

KEETON ON THE LAW OF TORTS § 18 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS §§ 49-62 (1965).

The defendant is not liable for the plaintiff's injury if the plaintiff's injury was caused by the plaintiff's own negligence. If the plaintiff's injury was caused by the plaintiff's own negligence, the defendant is not liable for the plaintiff's injury.

If the plaintiff's injury was caused by the plaintiff's own negligence, the defendant is not liable for the plaintiff's injury. If the plaintiff's injury was caused by the plaintiff's own negligence, the defendant is not liable for the plaintiff's injury.

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**20:12 SELF-DEFENSE OF PERSON**

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on *(his)* *(her)* claim of (assault) (battery) if the affirmative defense of self-defense of person is proved. This defense is proved if you find both of the following:

1. The defendant reasonably believed (even if mistakenly) that under the circumstances it was necessary to use force to protect *(himself)* *(herself)* from an actual or threatened (harmful) (or) (offensive) contact; and

2. The defendant used no more force than a reasonable person would have used under the same or similar circumstances to protect *(himself)* *(herself)* from the actual or threatened contact.

**Notes on Use**

1. Use whichever parenthesized words are appropriate. As to whether the parenthesized word “harmful” or “offensive” should be given, see Note 4 of the Notes on Use to Instruction 20:1.

2. When applicable, Instruction 20:13 should also be given with this instruction.

3. Omit either numbered paragraph or portions thereof if the facts are not in dispute, and make such other changes as are necessary in such circumstances to make the instruction understandable.

4. If there is a dispute as to whether the defendant made or threatened any contact, this instruction must be appropriately modified.

**Source and Authority**

1. This instruction is supported by **Minowitz v. Failing**, 109 Colo. 182, 123 P.2d 417 (1942) (numbered paragraph 2); **Courvoisier v. Raymond**, 23 Colo. 113, 47 P. 284 (1896) (numbered paragraph 1); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 19 (5th ed. 1984); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.11 (3d ed. 2006); and RESTATEMENT (SECOND) OF TORTS §§ 63, 65 (1965). *See also* **Valdez v. City & Cty. of Denver**, 764 P.2d 393 (Colo. App. 1988) (question of reasonableness of force used is ordinarily one for the jury).

2. Section 18-1-704, C.R.S., the “make-my-day” statute, creates a

defense in criminal cases (use of physical force, including deadly physical force, against an intruder of a dwelling). Section 18-1-704.5 creates immunity from civil liability if the statutory standards and circumstances of the “make my day” criminal defense are met. Although no Colorado appellate case has considered these statutes as applied in civil cases, if they are applicable, an appropriate instruction based on those statutes must be given, and this instruction should not be given, or, if given, must be appropriately modified as may be necessary to distinguish the privilege covered by this instruction from the privilege provided by the statute. *See People v. Guenther*, 740 P.2d 971, 981 (Colo. 1987) (holding that in criminal cases, under section 18-1-704.5(3), the phrase “immune from criminal prosecution” (which is comparable to the phrase “immune from any civil liability for injuries or death” in subsection (4)) requires the trial court to make a preliminary determination of the possible applicability of the statutory immunity to the facts of the case). If at a pretrial hearing the court determines that the defendant has shown by a preponderance of the evidence that the statute applies, the court must dismiss those “charges to which the immunity bar applies.” *Id.* If the court does not determine that right to immunity has been so proved, then the defendant may still raise the issue again at trial as an affirmative defense to be determined by the jury. *See, e.g., People v. Janes*, 982 P.2d 300 (Colo. 1999). In *Guenther*, 740 P.2d at 981, the court also set out the specific factual elements which must be proved under the statute.

## 20:13 SELF-DEFENSE—FORCE CALCULATED TO INFLICT DEATH OR SERIOUS BODILY INJURY

When a person acts in self-defense, the person may not use force that is likely to cause death or serious bodily harm, unless the person reasonably believes that he or she is in danger of death or serious bodily harm and that there is no other reasonable means of defense.

### Notes on Use

When the evidence shows that a force likely to inflict death or cause serious bodily injury may have been used in self-defense, this instruction, which elaborates more fully the rule stated in numbered paragraph 2 of Instruction 20:12, should also be given.

### Source and Authority

1. This instruction is supported by the cases cited in the Source and Authority to Instruction 20:12. *See also* **Kaufman v. People**, 202 P.3d 542 (Colo. 2009).

2. For a discussion of the use of deadly physical force in self-defense under section 18-1-704, C.R.S., see **People v. Toler**, 9 P.3d 341 (Colo. 2000) (no duty to retreat before using deadly force in self-defense except in certain specifically identified circumstances).

3. See paragraph 2 of the Source and Authority to Instruction 20:12, which discusses the civil immunity provided in section 18-1-704.5, C.R.S. (“make-my-day” statute).

**20:14 DEFENSE OF ANOTHER PERSON**

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on *(his)* *(her)* claim of (assault) (battery) if the affirmative defense of defense of another person is proved. This defense is proved if you find all of the following:

1. The defendant reasonably believed (even if mistakenly) that the plaintiff was making or was about to make *(a)* *(an)* (harmful) (or) (offensive) contact with *(name of third person)*; and

2. The defendant reasonably believed (even if mistakenly) that under the circumstances it was necessary for *(him)* *(her)* to intervene and use force to protect *(name of third person)*; and

3. The defendant used no more force than a reasonable person would have used under the same or similar circumstances to protect *(name of third person)* from the actual or threatened contact by the plaintiff.

**Notes on Use**

1. Use whichever parenthesized words are appropriate. As to whether the parenthesized word “harmful” or “offensive” should be given, see Note 4 of the Notes on Use to Instruction 20:1.

2. Omit any numbered paragraph or portions thereof if the facts are not in dispute.

3. If a force calculated to inflict serious bodily injury or death is involved, it may also be necessary to give Instruction 20:13, appropriately modified.

4. If the defendant’s intervention further provoked the plaintiff, so that the defendant became entitled to defend him or herself, Instruction 20:12 should also be given, with such modifications as are necessary to make it understandable in the context of the particular case.

5. If there is a dispute as to whether the defendant made or threatened any contact, this instruction must be appropriately modified.

**Source and Authority**

1. This instruction is supported by W. PAGE KEETON ET AL., PROSSER

AND KEETON ON THE LAW OF TORTS § 20 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS § 76 (1965).

2. In defending another person the defendant may have been mistaken, but reasonably so, as to (a) the need for intervention and (b) whether the third person was exercising or could have lawfully exercised his or her own privilege of self-defense. There is a split of authority on the question whether a defendant is entitled to the privilege of defense of another when the defendant has made either one or both of these mistakes, even reasonably. PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 20. RESTATEMENT § 76 adopts the view that a reasonable mistake will excuse the defendant. This instruction follows the RESTATEMENT view which is favored by W. PROSSER & W. KEETON as being more consistent with the usual rules governing self-defense. *See also* 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.12 (3d ed. 2006).

3. As in other cases of a privilege to defend persons or property, one may not use more force than is reasonably necessary. PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 20.

4. See paragraph 2 of the Source and Authority to Instruction 20:12, which discusses the civil immunity provided in section 18-1-704.5, C.R.S. ("make-my-day" statute).

## 20:15 BATTERY DEFENSES—DEFENSE OF REAL PROPERTY

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on (his) (her) claim of battery if the affirmative defense of defense of real property has been proved. This defense is proved if you find all of the following:

1. The plaintiff was on the defendant's property without permission; and

2. Before using any force the defendant (asked) (or) (told) the plaintiff to leave the property and gave (him) (her) a reasonable opportunity to leave (or the defendant reasonably thought that under the circumstances such a request would have been useless); and

3. The defendant reasonably thought it was necessary under the circumstances to use force to remove the plaintiff from (his) (her) property; and

4. The defendant used reasonable force to remove the plaintiff from his property.

### Notes on Use

1. Use whichever parenthesized phrases are appropriate.

2. Omit any numbered paragraph the facts of which are not in dispute.

3. If the plaintiff used force to resist the defendant's initial, privileged use of force, then the defendant may also be entitled to claim a privilege of self-defense of person. In such circumstances Instruction 20:12 (and, if appropriate, Instruction 20:13) should also be given with this instruction.

4. If there is a dispute as to whether the defendant used any force, this instruction must be appropriately modified.

### Source and Authority

1. This instruction is supported by the general law as set out in W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 21 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS § 77 (1965).

2. See paragraph 2 of the Source and Authority to Instruction 20:12, which discusses the civil immunity provided in section 18-1-704.5, C.R.S. ("make-my-day" statute).

## 20:16 BATTERY DEFENSES—DEFENSE OF PERSONAL PROPERTY

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on *(his)* *(her)* claim of battery if the affirmative defense of defense of personal property is proved. This defense is proved if you find all of the following:

1. The defendant had possession of *(insert description of the property)* (and was entitled to such possession); and

2. The plaintiff was attempting to interfere with the defendant's possession (or it reasonably appeared to the defendant that the plaintiff was attempting to interfere with the defendant's possession); and

3. Before using any force, the defendant (asked) (or) (told) the plaintiff to stop interfering with the defendant's possession of *(insert description of the property)* and gave *(him)* *(her)* a reasonable opportunity to stop the interference (or the defendant reasonably thought that under the circumstances such a request would be useless); and

4. The defendant reasonably thought that it was necessary under the circumstances to use force to prevent the plaintiff's interference with the possession of *(his)* *(her)* *(insert description of the property)*; and

5. The defendant used reasonable force to prevent the plaintiff's interference with the possession of *(his)* *(her)* *(insert description of the property)*.

### Notes on Use

The Notes on Use to Instruction 20:15 are also applicable to this instruction and should be read and applied accordingly.

### Source and Authority

This instruction is supported by the general law as set out in W.

PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 21 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS § 77 (1965).

The defendant, on the other hand, is not liable for battery if the plaintiff, knowing the defendant's intention to commit battery, consents to the defendant's touching or striking him or her.

4. The defendant is liable for battery if he or she intentionally touches or strikes the plaintiff without the plaintiff's consent.

5. The defendant is liable for battery if he or she intentionally touches or strikes the plaintiff without the plaintiff's consent, and the touching or striking is done in a hostile or insulting manner.

6. The defendant is liable for battery if he or she intentionally touches or strikes the plaintiff without the plaintiff's consent, and the touching or striking is done in a hostile or insulting manner, and the touching or striking is done in a hostile or insulting manner.

7. The defendant is liable for battery if he or she intentionally touches or strikes the plaintiff without the plaintiff's consent, and the touching or striking is done in a hostile or insulting manner, and the touching or striking is done in a hostile or insulting manner.

8. The defendant is liable for battery if he or she intentionally touches or strikes the plaintiff without the plaintiff's consent, and the touching or striking is done in a hostile or insulting manner, and the touching or striking is done in a hostile or insulting manner.

9. The defendant is liable for battery if he or she intentionally touches or strikes the plaintiff without the plaintiff's consent, and the touching or striking is done in a hostile or insulting manner, and the touching or striking is done in a hostile or insulting manner.

## 20:17 BATTERY DEFENSES—RECAPTURE OF PERSONAL PROPERTY

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on *(his)* *(her)* claim of battery if the affirmative defense of privilege to retake personal property is proved. This defense is proved if you find all of the following:

1. The defendant had possession of *(insert description of the property)* (and was entitled to such possession); and

2. The plaintiff (took possession of *[insert description of property]* either forcibly or fraudulently) (or) (took possession of *[insert description of property]* from someone else knowing that the other person had forcibly or fraudulently deprived the defendant of *[his]* *[her]* possession of *[insert description of property]*); and

3. The defendant (either) (was immediately aware that *[insert description of property]* had been taken from *[his]* *[her]* possession and *[he]* *[she]* took prompt action to retake possession) (or) (*[he]* *[she]* discovered within a reasonably short period of time that *[insert description of property]* had been taken from *[his]* *[her]* possession and *[he]* *[she]* then took prompt action to retake possession of *[insert description of property]*); and

4. Before using any force, the defendant (asked) (or) (told) the plaintiff to return *(insert description of the property)* and gave *(him)* *(her)* a reasonable time to do so (or the defendant reasonably thought that under the circumstances such a request would be useless); and

5. The defendant reasonably thought it was necessary under the circumstances to use force to retake possession of *(insert description of property)*; and

6. The defendant used reasonable force to retake possession of *(insert description of property)*.

### Notes on Use

The Notes on Use to Instruction 20:15 are also applicable to this instruction and should be read and applied accordingly.

### Source and Authority

1. This instruction is supported by the general law as set out in W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 22, at 137-39 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS §§ 100-106 (1965).

2. If the plaintiff lawfully acquired possession, the defense of privilege to recapture is not applicable. PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 22, at 138.

## **CHAPTER 21. FALSE IMPRISONMENT OR ARREST**

### **A. LIABILITY**

- 21:1 Elements of Liability
- 21:2 Restriction of Freedom of Movement—Defined
- 21:3 Intent—Defined
- 21:4 Intent to Restrict by Failure to Release
- 21:5 Actual or Nominal Damages

### **B. AFFIRMATIVE DEFENSES**

- 21:6 Consent
- 21:7 Statutory Privilege to Detain for Investigation
- 21:8 Common-Law Privilege to Detain for Investigation
- 21:9 Privilege to Defend Person or Property
- 21:10 Privilege of Any Person to Arrest Without a Warrant
- 21:11 Privilege of Peace Officer to Arrest Without a Warrant
- 21:12 Arrest—Defined
- 21:13 Reasonable Grounds for Believing and Probable Cause to Believe—Defined
- 21:14 Fresh Pursuit—Defined
- 21:15 Privilege to Arrest with a Warrant
- 21:16 Indication of Intent to Arrest—When Excused
- 21:17 Valid Warrant or Warrant Fair on Its Face—Defined
- 21:18 Guilt of Person Arrested
- 21:19 Abuse of a Privilege to Arrest

## A. LIABILITY

### 21:1 ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of (false imprisonment) (false arrest), you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant intended to restrict the plaintiff's freedom of movement;
2. The defendant, directly or indirectly, restricted the plaintiff's freedom of movement for a period of time, no matter how short; and
3. The plaintiff was aware that (his) (her) freedom of movement was restricted.

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

In determining whether the affirmative defense of privilege [*describe privilege*] has been proved, you must also determine whether the defendant abused that privilege as explained in Instruction No. [*insert instruction number that corresponds with Instruction 21:19*].

However, if you find that (this affirmative defense

has not) (none of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the plaintiff.

### Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. Use whichever parenthesized phrase, “false imprisonment” or “false arrest,” is more appropriate.

4. Omit the last three paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense. Omit the clause dealing with abuse of a privilege to arrest unless (1) the affirmative defense is that of a privilege to arrest and (2) there is sufficient evidence of abuse of such privilege to warrant giving this portion of the instruction. *See* Instruction 21:19.

5. Other appropriate instructions defining the terms used in this instruction, for example, Instruction 21:2, defining restriction on freedom of movement, must also be given with this instruction.

6. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, it is rarely a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

### Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 35 (false imprisonment) and § 41 (confinement by false arrest) (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11 (5th ed. 1984); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS §§ 3.7, 3.8 (3d ed. 2006). *See also* **Blackman v. Rifkin**, 759 P.2d 54 (Colo. App. 1988).

2. In **Union Pacific Railroad v. Dennis**, 73 Colo. 66, 213 P. 332 (1923), there is a statement that the plaintiff, in order to prove a false arrest, must prove the arrest was without legal justification. However, in **Crews-Beggs Dry Goods Co. v. Bayle**, 97 Colo. 568, 51 P.2d 1026 (1935), legal justification is treated as a matter of affirmative defense. *Accord* RESTATEMENT § 118; PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 11, at 53; *see also* **Goodboe v. Gabriella**, 663 P.2d 1051 (Colo.

App. 1983) (citing and discussing this instruction with approval, noting in particular that since a justified detention is a matter of affirmative defense, the plaintiff need not prove as a necessary element of liability that the detention was "unlawful"). *But see Rose v. City & Cty. of Denver*, 990 P.2d 1120 (Colo. App. 1999) (the court concluded as a matter of law that officer had probable cause to arrest plaintiff).

3. One may be liable for a false arrest or imprisonment, though his or her conduct, for example, as an instigator, was only an indirect cause of the false arrest or imprisonment. RESTATEMENT § 45A; *see also* Notes on Use and Source and Authority to Instruction 21:3.

## 21:2 RESTRICTION OF FREEDOM OF MOVEMENT—DEFINED

A person's freedom of movement has been restricted when:

(1. A person's freedom of movement is actually limited, or he or she believes that it has been limited to a certain area by physical barriers and does not know of any way to escape without causing an unreasonable risk of harm to him or herself or to property.)

(2. The person is restrained by physical force, however slight, which overpowered the person or to which the person submitted.)

(3. The person complies with actual or apparent threats that he or she or a member of his or her family will be immediately harmed if he or she moves beyond or refuses to go to a certain area.)

(4. The person complies with actual or apparent threats that his or her property will be damaged or destroyed if he or she refuses to move past or to a certain area.)

(5. The person submits to another who states that he or she has the legal authority to [arrest the person] [take that person into custody].)

(6. The person is stopped and prevented from leaving by another under circumstances that caused the person to reasonably believe that if he or she tried to leave, he or she would be immediately subjected to social disgrace or to *[describe any sufficiently severe economic sanction, e.g., loss of job, with which the evidence shows the plaintiff may have been threatened]*).

### Notes on Use

1. Use whichever parenthesized paragraph or paragraphs (and bracketed portions thereof) are appropriate. When more than one

numbered paragraph is used, the paragraphs should be clearly stated as alternatives.

2. This instruction is intended to cover most, but not necessarily all, of the situations which may give rise to a sufficient detention, restraint or confinement to support a claim for false imprisonment or arrest. If the circumstances of a particular case are unique, a more appropriate instruction should be substituted.

3. Numbered paragraph 1: When a person's freedom of movement has been restricted in one or more directions, but other avenues are open to the person—for example, when a highway is blocked—the person's freedom of movement has not been restricted sufficiently to constitute the tort of false imprisonment. RESTATEMENT (SECOND) OF TORTS § 36 cmt. d (1965).

4. Numbered paragraphs 3 and 4: Sound policy may justify in particular cases extending the scope of either of these clauses to include threats against the person or property of others than those named, for example, close friends or customers in a store. In such cases, the instruction should be modified accordingly.

5. Numbered paragraph 5: In most cases, the word "custody" need not be defined. However, if that is not the case, an appropriate instruction should be given. Also, in most cases, the legal authority asserted will be that of arrest. However, in some cases it may not, for example, the recapture of an escaped mental incompetent who has been confined to an institution.

6. Numbered paragraph 6: There appears to be little authority for this form of restriction. To the extent it has been recognized, it would appear that the social disgrace or economic sanction which is impliedly or expressly threatened must have been sufficient to constitute duress. See RESTATEMENT § 40A; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11, at 50 (5th ed. 1984).

### Source and Authority

This instruction is supported by **McDonald v. Lakewood Country Club**, 170 Colo. 355, 461 P.2d 437 (1969) (supporting paragraphs 2 and 3 and involving restraint imposed by force or threat of force); **Crews-Beggs Dry Goods Co. v. Bayle**, 97 Colo. 568, 51 P.2d 1026 (1935) (supporting paragraph 2 and involving restraint by only slight force to which plaintiff submitted because any restraint by force or fear constitutes false imprisonment); **Union Pacific Railroad v. Dennis**, 73 Colo. 66, 213 P. 332 (1923) (paragraph 5); **Kettelhut v. Edwards**, 65 Colo. 506, 177 P. 961 (1919) (paragraph 5); RESTATEMENT §§ 36–38 (paragraph 1); RESTATEMENT § 39 (paragraph 2); RESTATEMENT § 40 (paragraph 3); RESTATEMENT § 40A cmt. a (paragraphs 3 and 4); RESTATE-

MENT § 41 (paragraph 5); PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 11, at 49–51; and 1 F. HARPER ET AL. HARPER, JAMES, AND GRAY ON TORTS § 3.8 (3d ed. 2006). See also **Havens v. Hardesty**, 43 Colo. App. 162, 600 P.2d 116 (1979) (lawyer held liable for false arrest even though he was acting in good faith for his client and arrest of plaintiff was result of “mistaken identity”).

## 21:3 INTENT—DEFINED

A person intends to restrict freedom of movement if he or she acts for the purpose of restricting another's freedom of movement or acts with knowledge that a restriction will probably result. This intent exists even if a person acts without malice or ill will or acts under a mistaken belief that he or she is privileged to restrict the other's freedom of movement.

### Notes on Use

Instruction 21:4 should be used rather than this instruction when there is sufficient evidence that the claimed false imprisonment was a result of the defendant's refusal or failure to release the plaintiff from a confinement, which the defendant was under a duty to do.

### Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS §§ 37, 43–44 (1965); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.7 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11, at 52–53 (5th ed. 1984).

2. If the restriction of one's freedom of movement is caused by negligent or even reckless conduct on the part of the defendant, it is not sufficient to create the intent necessary for false imprisonment or arrest. HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 3.7, at 333–34.

3. The most common occurrences where the defendant would have knowledge that a restriction would probably result from the defendant's act is where the defendant directs a peace officer to arrest the plaintiff and the arrest is not privileged, or where the defendant assists a third person who is not a peace officer to make an arrest which the third person is not privileged to make. *See, e.g., Grimes v. Greenblatt*, 47 Colo. 495, 107 P. 1111 (1910) (defendant instigated or ratified unlawful arrest by police officer); *Harris v. McReynolds*, 10 Colo. App. 532, 51 P. 1016 (1898) (defendant directed police officer to make arrest).

## 21:4 INTENT TO RESTRICT BY FAILURE TO RELEASE

**A person intends to restrict the freedom of movement of another if:**

- 1. That person knows the other is confined to fixed physical boundaries;**
- 2. That person is under a legal duty (to release the other) (to provide the other a reasonable means of release from the place of confinement); and**
- 3. That person refuses or knowingly fails to perform that duty for the purpose of continuing the confinement of the other.**

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. This instruction is meant to cover the situations where the defendant has refused to release the plaintiff at the termination of a lawful confinement in jail, or where the plaintiff voluntarily entered into a confinement upon the assurance of the defendant that the defendant would release the plaintiff and the defendant thereafter refused to do so.
3. If there is a dispute as to whether a legal duty existed, an additional instruction should be given. Such an instruction might read: "A legal duty existed if *(insert the basis for the claimed legal duty, for example, a contract between the plaintiff and the defendant, or a duty created by statute or common law)*."

### Source and Authority

This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 45 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11, at 51–52 (5th ed. 1984); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.8, at 335–38 (3d ed. 2006).

## 21:5 ACTUAL OR NOMINAL DAMAGES

Plaintiff, *(name)*, has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the *(insert appropriate description, e.g., "false imprisonment" or "arrest")* of the plaintiff by defendant(s), *(name[s])*, (and the *[insert appropriate description, e.g., "negligence"]*, if any, of any designated nonparties).

In determining these damages, you shall consider the following:

1. Any noneconomic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: physical and mental pain and suffering, inconvenience, emotional stress, fear, anxiety, embarrassment, humiliation, impairment of the quality of life, and *[insert any other recoverable noneconomic losses for which there is sufficient evidence]*. (In considering damages in this category, you shall not include actual damages for [physical impairment] [or] [disfigurement], because these damages, if any, are to be considered in a separate category.)

2. Any economic losses or injuries which plaintiff has had to the present time or which plaintiff will probably have in the future, including: loss of earnings or income or damage to (his) (her) ability to earn money in the future; impairment of earning capacity; (reasonable and necessary) medical, hospital, and other expenses, and *[insert any other recoverable economic losses for which there is sufficient evidence]*. (In considering damages in this category, you shall not include actual damages for [physical impairment] [or] [disfigurement], since these damages, if any, are to be considered in a separate category.)

(3. Any [physical impairment] [or]

[disfigurement]. In considering damages in this category, you shall not include damages again for losses or injuries already determined in either numbered paragraph 1 or 2 above.)

If you find in favor of the plaintiff, but do not find any actual damages, you shall award (him) (her) nominal damages of one dollar.

#### Notes on Use

1. Use only those numbered parenthesized paragraphs or portions that are appropriate to the evidence in the case.

2. Comparative negligence is not a defense to an intentional tort claim. **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (1979). Therefore, the first paragraph of this instruction varies from the comparable damage instructions in “simple” negligence cases by eliminating any reference to plaintiff’s own negligence.

3. Where the original arrest was privileged but subsequently abused by a failure to take the plaintiff promptly before a proper magistrate, *see* numbered paragraph 2 of Instruction 21:19, there is a split of authority on the question whether the defendant is liable for damages for the entire period of detention or only for that portion of time which constituted the unreasonable delay. *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 25, at 150–52 (5th ed. 1984). If it is determined in these cases that under the proper law the arrest should not be viewed as being false *ab initio*, then this instruction, when given in such cases, should be appropriately modified.

4. In some cases, an appropriate instruction relating to causation may need to be given with this instruction. *See* Instructions 9:18–9:21.

#### Source and Authority

This instruction is supported by **Union Pacific Railroad v. Dennis**, 73 Colo. 66, 213 P. 332 (1923) (approving damages for medical and other expenses, lost wages, physical pain and suffering, humiliation, and injured reputation); and *PROSSER AND KEETON ON THE LAW OF TORTS, supra*, § 11, at 48–49.

## B. AFFIRMATIVE DEFENSES

### 21:6 CONSENT

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (false imprisonment) (false arrest) if the affirmative defense of consent is proved. This defense is proved if you find that the plaintiff, with full knowledge that (his) (her) freedom of movement was to be restricted, willingly submitted to the restriction.

However, one does not willingly consent to a restriction of his or her freedom of movement by expressly or impliedly agreeing to submit him or herself to the control or direction of another when that submission has been obtained by

(1. [An arrest] [A taking of the person into custody] that the person submitting believes is valid [or if in doubt as to its validity, nevertheless submits]).

(2. Exerting any physical force, or making any actual or apparent threats of physical harm to the person submitting or to any member of his or her family).

(3. Making any actual or apparent threats of physical harm to, or loss of, property of the person submitting).

#### Notes on Use

1. Use whichever numbered parenthesized paragraph or paragraphs (and bracketed portions thereof) as are appropriate. When more than one numbered paragraph is used, the paragraphs should be clearly stated as alternatives.

2. In the first unnumbered paragraph, use whichever phrase, "false imprisonment" or "false arrest," is more appropriate.

3. If there is a dispute as to whether the defendant restricted the

plaintiff's freedom of movement, this instruction must be appropriately modified.

4. Implied consent based on emergency has been recognized as an affirmative defense to the tort of false imprisonment. **Blackman v. Rifkin**, 759 P.2d 54 (Colo. App. 1988). Consequently, when supported by sufficient evidence, Instruction 15:9, appropriately modified, may be given in lieu of, or, if appropriate, in addition to, this instruction.

### Source and Authority

1. This instruction is supported by W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11, at 49–51 (5th ed. 1984); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS §§ 3.8, 3.10 (3d ed. 2006). *See also* **People v. Diaz**, 793 P.2d 1181 (Colo. 1990) (consent is voluntary when it is the product of free and unconstrained choice and not the result of force, threat, or promise).

2. Submitting to a claim of lawful authority does not constitute consent. **Kaupp v. Texas**, 538 U.S. 626 (2003) (seventeen-year-old defendant's failure to struggle and response of "okay" to statement of police officer did not constitute consent where defendant was awakened in his bedroom by three police officers at three o'clock in the morning and taken from his home in handcuffs for questioning).

## 21:7 STATUTORY PRIVILEGE TO DETAIN FOR INVESTIGATION

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (false imprisonment) (false arrest) if the affirmative defense of a privilege to detain for investigation is proved. This defense is proved if you find all of the following:

1. The defendant was a peace officer, or an owner or employee of a (store) (business establishment selling merchandise);
2. The defendant acted in good faith and had probable cause based upon reasonable grounds to believe that the plaintiff:
  - a. Triggered an alarm or a theft detection device, or
  - b. Concealed upon (his) (her) person any unpurchased goods, wares, or merchandise held or owned by the store or business establishment selling merchandise, or
  - c. Otherwise carried away any unpurchased goods, wares, or merchandise held or owned by the store or business establishment selling merchandise;
3. The defendant detained and questioned the plaintiff in a reasonable manner for the purpose of determining whether the plaintiff committed theft.

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. Omit any numbered paragraphs, the facts of which are not in dispute.
3. When this instruction is given, another instruction defining "theft" should also be given. See § 18-4-401, C.R.S. For the appropriate

definition of “peace officer,” see sections 16-2.5-101 to -151, C.R.S., and for “concealment,” see section 18-4-406, C.R.S.

4. If there is a dispute as to whether the defendant detained or questioned the plaintiff at all, numbered paragraphs 3 and 4 of this instruction must be appropriately modified.

5. “Theft detection device” is defined by § 18-4-417(2)(b), C.R.S. The court should determine whether the device at issue qualifies as a theft detection device under the statute. If it does not, then subparagraph 2a of this instruction should be deleted.

6. In **Gonzales v. Harris**, 34 Colo. App. 282, 528 P.2d 259 (1974) *rev’d on other grounds*, 189 Colo. 518, 542 P.2d 842 (1975), the court construed section 18-4-407, C.R.S., in conjunction with section 18-4-406, which defines “concealment” for purposes of making concealment prima facie evidence of intent to commit theft, and held: (1) the “concealment” could be on the person of the plaintiff or elsewhere, whether on or off the premises; (2) the person could be detained under the statute (if other conditions were met) while a search was being made of the premises; and (3) to this extent the statutory privilege codified and was broader than the common-law privilege. *See* Source and Authority to Instruction 21:8.

7. In some circumstances different from those involved in **Gonzales**, the defendant may wish to rely as well on the common-law privilege set out in Instruction 21:8, for example, a case involving a drug store serving food as well as selling goods, and the plaintiff was detained both for investigation of payment for food service as well as payment for goods. In such circumstances, if both instructions are given, each must be appropriately modified in order to identify the privileges and to make it clear to the jury that they are distinct, separate privileges.

8. Similarly, under section 16-3-103(1), C.R.S., a peace officer has a broader statutory privilege to “stop any person who he reasonably suspects is committing, has committed, or is about to commit a crime and . . . require him to give his name and address, identification if available, and an explanation of his actions. . . . The stopping shall not constitute an arrest.” In certain cases, a defendant may seek to rely on this statutory privilege as well, and produce sufficient evidence for this privilege as well as the privilege set out in this instruction or in Instruction 21:8. In such circumstances, if instructions covering more than one privilege are given, each must be appropriately modified in order to identify it and to make it clear to the jury that they are distinct, separate privileges.

9. For modifications that may be required in this instruction when a child is detained, see section 19-2-502, C.R.S.

10. Under section 18-4-407, the privilege set out in this instruction would appear to apply whether the plaintiff is an employee, a customer, or some other person.

### Source and Authority

This instruction is supported by the statutory privilege conferred by section 18-4-407. In **J.S. Dillon & Sons Stores Co. v. Carrington**, 169 Colo. 242, 455 P.2d 201 (1969), the court, interpreting the statute as it was worded prior to its amendment in 1967, held that in order to rely on the statutory privilege, the defendant was not required to prove the plaintiff had, in fact, committed the crime of shoplifting. *See also Gonzales*, 34 Colo. App. at 288–89, 528 P.2d at 263 (decided after the 1967 amendment).

## 21:8 COMMON-LAW PRIVILEGE TO DETAIN FOR INVESTIGATION

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on (his) (her) claim of (false imprisonment) (false arrest) if the affirmative defense of a privilege to detain for investigation is proved. This defense is proved if you find all of the following:

1. The defendant was (the owner, agent or employee of a business) (a peace or police officer);

2. The defendant believed and had reasonable grounds to believe the plaintiff had wrongfully (taken items) (secured services) from (the defendant's business premises) (a business establishment) or had failed to make arrangements for the payment of (the items the plaintiff had received) (the services which had been rendered to the plaintiff);

3. The defendant detained the plaintiff solely for the purpose of questioning the plaintiff about the matter;

4. The defendant questioned the plaintiff in a reasonable manner and only for a reasonable period of time; and

5. The plaintiff was in the place of business or had just left and was in the immediate vicinity.

### Notes on Use

1. Notes 7 and 8 of the Notes on Use to Instruction 21:7 are also applicable to this instruction. This instruction is intended to cover those circumstances in which the statutory privilege set out in Instruction 21:7 would not be applicable, for example, because of the nature of the establishment or the property involved.

2. Use whichever parenthesized words are appropriate.

3. Omit any numbered paragraphs, the facts of which are not in dispute.

4. When this instruction is given, another instruction defining

“wrongfully” may be required. “Wrongfully” would include tortious as well as criminal conduct. For the appropriate definition of “peace or police officer,” see sections 16-2.5-101 to -151, C.R.S.

5. This instruction does not apply where the detention is in the form of a purported arrest or a taking of the plaintiff into custody. In such circumstances, however, Instruction 21:10 or Instruction 21:11 may be applicable.

6. This instruction applies whether the plaintiff is an employee, customer, or some other third person.

7. If there is a dispute as to whether the defendant detained or questioned the plaintiff, numbered paragraph 3 or 4, or both, must be appropriately modified.

### Source and Authority

1. This instruction is based on RESTATEMENT (SECOND) OF TORTS § 120A (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 22, at 141–42 (5th ed. 1984); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.14 (3d ed. 2006).

2. In **Crews-Beggs Dry Goods Co. v. Bayle**, 97 Colo. 568, 51 P.2d 1026 (1935), the facts were such that the defendant might have been able to raise the privilege set out in this instruction. The defendant, however, did not, and the court held that, without a showing of justification, the defendant’s conduct in temporarily detaining a customer suspected of shoplifting constituted a false imprisonment.

3. As to when a police officer may properly detain a person for investigative purposes generally, see the cases cited in paragraph 7 of the Source and Authority to Instruction 21:11.

## 21:9 PRIVILEGE TO DEFEND PERSON OR PROPERTY

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on *(his)* *(her)* claim of *(false imprisonment)* *(false arrest)* if the affirmative defense of privilege to defend *(person)* *(property)* is proved. This defense is proved if you find both of the following:

1. When the defendant restricted the plaintiff's freedom of movement, *(he)* *(she)* believed and had reasonable grounds to believe that the plaintiff intended to *(inflict harm upon [his] [her] person or that of another)* *(or)* *(interfere or continue to interfere with the defendant's right to possess [his] [her] land or personal property)*; and

2. This restriction of the plaintiff's freedom of movement was reasonably imposed, under the circumstances, to prevent the plaintiff's actions, considering the length of the time of the restriction, the seriousness of the threatened harm to, or interference with, the defendant's *(person)* *(or)* *(property)*, and the seriousness of any harm that might result to the plaintiff from the restriction.

### Notes on Use

1. Use whichever parenthesized or bracketed words are appropriate.
2. Omit any portions of this instruction, the facts of which are not in dispute.
3. If there is a dispute as to whether the defendant did, in fact, restrict the plaintiff's freedom of movement, the first numbered paragraph of this instruction must be appropriately modified.

### Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS sections 67, 76, 80, and 87 (1965), and the authorities cited in Source and Authority to Instructions 20:12 to 20:17.
2. In general, the same requirements apply to the exercise of a priv-

ilege to defend persons or property by way of force which would otherwise amount to a false imprisonment or arrest as apply to force which would otherwise amount to an assault or battery. The instructions setting forth the privileges to use force in the form of assault or battery to defend persons or property are Instructions 20:12 through 20:17. This instruction has been drafted in terms which will usually be more appropriate to a false imprisonment or false arrest case. However, it has been drafted in more general terms and does not necessarily include all the conditions which may have to be met in order to qualify for a particular privilege in a particular case. For example, in using a confinement to defend property, the defendant may not, in most cases, have used a force which would inflict death or serious bodily injury, and, before imposing any confinement, the circumstances may have been such that the defendant should first have requested the plaintiff to desist. *See, e.g.*, Instructions 20:16 and 20:17. In any particular case, therefore, when this instruction would not cover all the necessary conditions for the exercise of a particular privilege, this instruction should be modified accordingly.

## 21:10 PRIVILEGE OF ANY PERSON TO ARREST WITHOUT A WARRANT

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (false imprisonment) (false arrest) if the affirmative defense of a privilege to arrest without a warrant is proved (and you do not find such privilege, if any, was abused). The defendant was privileged to arrest the plaintiff without a warrant if you find (any of) the following (has) (have) been proved:

(1. The plaintiff, at the time of the arrest, was committing a crime in the presence of the defendant, and the defendant arrested the plaintiff for that crime) (or)

(2. The plaintiff had committed a crime in the presence of the defendant, and the defendant arrested the plaintiff for that crime immediately or after a fresh pursuit) (or)

(3. The plaintiff or someone else had committed a felony, though not necessarily in the defendant's presence, and the defendant arrested the plaintiff for that felony, reasonably believing the plaintiff had committed it) (or)

(4. The plaintiff knew that his or her conduct would cause the defendant to believe that the plaintiff was committing a crime in the defendant's presence, and the defendant arrested the plaintiff for that crime) (or)

(5. The plaintiff knew that his or her conduct would cause the defendant to believe that the plaintiff had committed a crime in the defendant's presence, and the defendant arrested the plaintiff for the crime immediately or after a fresh pursuit) (or)

(6. The plaintiff knew that his or her conduct would cause the defendant to believe that a felony

**had been committed and the defendant arrested the plaintiff for that felony, reasonably believing the plaintiff was the person who had committed it.)**

### Notes on Use

1. As to the privilege of a peace officer to effect an arrest without a warrant, see Instruction 21:11.

2. In the first paragraph, use whichever parenthesized phrase, "false imprisonment" or "false arrest," is more appropriate, and omit the parenthesized phrase relating to abuse of privilege unless there is evidence to support it.

3. Use whichever parenthesized numbered paragraphs are appropriate to the case. If only one numbered paragraph is used, omit the parenthesized phrase "any of" in the first unnumbered paragraph.

4. Depending on the circumstances, other appropriate instructions defining such terms as, for example, "reasonable grounds" (Instruction 21:13), "fresh pursuit" (Instruction 21:14), and an instruction setting forth the elements of the claimed "crime," "criminal offense" or "felony" involved should be given with this instruction.

5. For modifications which may be required in this instruction when a child is detained, see sections 19-2-502 and 19-2-503, C.R.S.

6. If there is a dispute as to whether the defendant did in fact restrict the plaintiff's freedom of movement by an arrest or otherwise, this instruction must be appropriately modified.

7. In order to have an arrest at all on which a privilege to arrest without a warrant may be based, the person making the arrest, unless excused because of the circumstances, must indicate (1) his intent to make an arrest and (2) the offense or conduct for which the arrest is being made. RESTATEMENT (SECOND) OF TORTS § 128 (1965); 1 F HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.18, at 426 (3d. ed. 2006). If there is a dispute as to either of these matters, then Instruction 21:12 (defining arrest) and, if appropriate, Instruction 21:16 (explaining when a manifestation to make an arrest may be excused) must be given with this instruction. Also the instruction should be modified to state, in effect, that when the defendant made the claimed arrest, the defendant must have indicated an intent to arrest the plaintiff and indicated to the plaintiff the offense or conduct for which the arrest was being made, unless, because of the circumstances (Instruction 21:16), the failure to do so was excusable.

8. The privileges set out in this instruction do not extend to one who reasonably believes a criminal offense or felony has been commit-

ted when, in fact, one has not been, unless this belief was knowingly caused by the plaintiff. However, an attempt to commit a crime may itself be a crime, *see, e.g.*, section 18-2-101, C.R.S., in which case the defendant may have been privileged to make an arrest for the crime of attempt. In those cases, in order to clarify this point, it may be necessary to modify this instruction.

### Source and Authority

1. Numbered paragraphs 2 and 3 of this instruction are supported by section 16-3-201, C.R.S.

2. The common-law privileges set out in numbered paragraphs 3 and 6 are supported by RESTATEMENT § 119. Paragraphs 4 and 5 are supported by both the relevant Colorado statutes and RESTATEMENT § 119(e). *See also* PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 26; HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 3.18.

3. In addition to the common-law and statutory privileges of a private person set out in this instruction, a private person may have other privileges when acting upon the command of a peace officer to assist the officer in making an arrest. § 16-3-202, C.R.S.

4. "The 'in presence' requirement is met if the arrestor observes acts which are in themselves sufficiently indicative of a crime in the course of commission." **People v. Olguin**, 187 Colo. 34, 37, 528 P.2d 234, 236 (1974).

5. In addition to statutory crimes, "criminal offense" may include the violation of a municipal ordinance. **Boyer v. Elkins**, 154 Colo. 294, 390 P.2d 460 (1964).

## 21:11 PRIVILEGE OF PEACE OFFICER TO ARREST WITHOUT A WARRANT

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on (his) (her) claim of (false imprisonment) (false arrest) if the affirmative defense of a privilege to arrest without a warrant is proved (and you do not find such privilege, if any, was abused). The defendant was privileged to arrest the plaintiff without a warrant if you find (any of) the following (has) (have) been proved:

(1. *[Insert any of the privileges afforded a private person in Instruction 21:10 which may be applicable]*) (or)

(2.a. The defendant was a peace officer acting within the scope of [his] [her] authority at the time of the arrest; and

b. The plaintiff had committed or was committing a criminal offense in the presence of the defendant; and

c. The defendant arrested the plaintiff for that offense) (or)

(3.a. The defendant was a peace officer acting within the scope of [his] [her] authority at the time of the arrest; and

b. The defendant believed and had probable cause to believe that a criminal offense had been committed, whether it had or not; and

c. The defendant believed and had probable cause to believe the plaintiff had committed that criminal offense; and

d. The defendant arrested the plaintiff for that offense).

### Notes on Use

1. In the first paragraph, use whichever parenthesized phrase, “false imprisonment” or “false arrest,” is more appropriate and omit the parenthesized phrase relating to abuse of privilege unless there is evidence to support it.

2. Use whichever parenthesized numbered paragraphs are appropriate to the case, omitting any portions thereof, the facts of which are not in dispute. If only one numbered paragraph is used, omit the parenthesized phrase “any of” in the first unnumbered paragraph.

3. In appropriate cases, a more suitable phrase, for example, “police officer,” may be substituted for the phrase “peace officer.” Also, for the various statutory definitions of “peace officer,” see sections 16-2.5-101 to -151, C.R.S.

4. Depending on the circumstances, other appropriate instructions defining such terms as, for example, “reasonable grounds” or “probable cause” (Instruction 21:13), and instructions setting forth the elements of the claimed “criminal offense,” the scope of the defendant’s “authority”, etc., should be given with this instruction.

5. For modifications that may be required in this instruction when a child is detained, see sections 19-2-502 and 19-2-503, C.R.S.

6. In order to have an arrest at all on which a privilege to arrest without a warrant may be based, the person making the arrest, unless excused because of the circumstances, must indicate (1) his or her intent to make an arrest and (2) the offense or conduct for which the arrest is being made. RESTATEMENT (SECOND) OF TORTS § 128 (1965); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.18, at 426 (3d ed. 2006). If there is a dispute as to such matters, then Instruction 21:12, defining “arrest” and, if appropriate, Instruction 21:16, explaining when a manifestation to make an arrest may be excused, must be given with this instruction. Also an additional requirement should be added to this instruction stating in effect that when the defendant made the claimed arrest the defendant must have indicated an intent to arrest the plaintiff and indicated to the plaintiff the offense or conduct for which the arrest was being made, unless, because of the circumstances (Instruction 21:16), such indication was excusable.

7. If there is a dispute as to whether the defendant did, in fact, restrict the plaintiff’s freedom of movement by an arrest or otherwise, this instruction must be appropriately modified.

8. A peace officer may make a valid arrest without a warrant in certain circumstances other than those set out in this instruction. In such cases, this instruction should be appropriately modified. *See, e.g.,*

**People v. Gouker**, 665 P.2d 113 (Colo. 1983) (outstanding arrest warrant from a sister state, if valid, may provide the necessary probable cause to make a warrantless arrest in Colorado, even though the detained person is arrested for a different offense, if the arresting officer was aware of the outstanding sister-state warrant and was at least partially motivated by it).

9. Concerning numbered paragraph 1 of this instruction referring to Instruction 21:10 (privileges to arrest afforded a private person), to make a valid arrest under section 16-3-201, C.R.S., a peace officer must have been acting as a private citizen. **People v. Wolf**, 635 P.2d 213 (Colo. 1981).

10. This instruction should be modified in cases where an arrest is made in a private home. See **People v. Summitt**, 104 P.3d 232 (Colo. App. 2004) (absent consent, exigent circumstances, or the need to render emergency aid, police officers may not arrest person without warrant in a private home even if police have probable cause to believe that the person arrested has committed a crime), *rev'd on other grounds*, 132 P.3d 320 (Colo. 2006).

### Source and Authority

1. For authorities in support of paragraph 1, see the Source and Authority to Instruction 21:10.

2. Numbered paragraphs 2 and 3 are supported by the statutory privilege contained in sections 16-3-102(b) and (c), C.R.S. The common-law privilege now covered by numbered paragraph 3 related at common law only to felonies. See RESTATEMENT § 121(b); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 26 (5th ed. 1984); HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 3.18.

3. As to the territorial limits of a peace officer's authority while in fresh pursuit, see section 16-3-106, C.R.S. Also, as to the authority of a peace officer from another state, see section 16-3-104, C.R.S. To make a valid arrest as a peace officer without a warrant under section 16-3-102, C.R.S., outside the territorial limits of the peace officer's authority, the officer must have been engaged in fresh pursuit (Instruction 21:14), **People v. Wolf**, 635 P.2d 213 (Colo. 1981), unless the officer was acting under authority conferred by section 16-3-110(2), C.R.S. (authority of full-time, certified peace officer to make an arrest outside the jurisdiction of the law enforcement agency employing the officer of a person who has or is committing a felony or misdemeanor in the officer's presence).

4. "The 'in presence' requirement is met if the arrestor observes acts which are in themselves sufficiently indicative of a crime in the course of commission." **People v. Olguin**, 187 Colo. 34, 37, 528 P.2d 234, 236 (1974).

5. In addition to statutory crimes, "criminal offense" may include

the violation of a municipal ordinance. **Boyer v. Elkins**, 154 Colo. 294, 390 P.2d 460 (1964).

6. The detention and questioning by a peace officer as part of a valid and properly conducted “investigatory stop” would appear to be an effective affirmative defense to the tort of “false arrest,” whether or not a subsequent arrest is validly made, with or without a warrant. See § 16-3-103, C.R.S. In such cases, this instruction must be appropriately modified.

7. Under **Terry v. Ohio**, 392 U.S. 1 (1968), an investigatory stop of reasonable scope and duration is a seizure, but is valid under the Fourth Amendment to the United States Constitution if the officer had reasonable suspicion to believe the person stopped had committed or was committing a crime. See **Arizona v. Johnson**, 555 U.S. 323 (2009) (proper **Terry** traffic stop justifies continued seizure of car occupants pending inquiry into vehicular offense, without evidence of any other criminal activity); **United States v. Arvizu**, 534 U.S. 266 (2002); **Illinois v. Wardlow**, 528 U.S. 119 (2000); **Stone v. People**, 174 Colo. 504, 485 P.2d 495 (1971); **People v. Barrus**, 232 P.3d 264 (Colo. App. 2009) (officer had reasonable suspicion for stop, and nature of detention was proper, even though it escalated when defendant tried to escape); see also **Minnesota v. Dickerson**, 508 U.S. 366 (1993) (permissible scope of pat-down search after investigatory stop); **People v. Bowles**, 226 P.3d 1125 (Colo. App. 2009) (request for identification during proper **Terry** stop is permissible); **People v. Perez**, 852 P.2d 1297 (Colo. App. 1992) (permissible scope of search).

8. A court may conclude as a matter of law that an officer had probable cause to arrest the plaintiff. **Rose v. City & Cty. of Denver**, 990 P.2d 1120 (Colo. App. 1999).

## 21:12 ARREST—DEFINED

An arrest is taking another into custody (by physical force) (or) (by asserting legal authority over him or her) for the apparent purpose of having that person dealt with as provided by law.

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. This instruction should be given in conjunction with other Instructions such as 21:10 and 21:11.

### Source and Authority

1. This instruction is supported by **Hart v. Herzig**, 131 Colo. 458, 464, 283 P.2d 177, 180–81 (1955) (“[A]ctual use of force is not necessary to constitute an arrest; but the intention to arrest, i.e., to take into custody, must be there, and must be evidenced by some unequivocal act, as by keeping the arrested party in sight and controlling his actions.” (quoting **Berry v. Bass**, 102 So. 76, 77 (La. 1924)); and RESTATEMENT (SECOND) OF TORTS § 112 (1965). See also **People v. Tottenhoff**, 691 P.2d 340 (Colo. 1984).

2. As to when and with what force an arrest may be effected, see sections 16-3-101 and 18-1-707, C.R.S.

3. For a discussion of the differences between an “investigatory stop” and an arrest without a warrant, see section 16-3-103(1), C.R.S.; **People v. Taylor**, 41 P.3d 681 (Colo. 2002); **Tottenhoff**, 691 P.2d at 343–44; **People v. Hazelhurst**, 662 P.2d 1081 (Colo. 1983); **People v. O’Neal**, 32 P.3d 533 (Colo. App. 2000); and **People v. Whitaker**, 32 P.3d 511 (Colo. App. 2000), *aff’d on other grounds*, 48 P.3d 555 (Colo. 2002). For additional cases involving investigatory stops, see those cited in Note 7 of the Source and Authority to Instruction 21:11.

## 21:13 REASONABLE GROUNDS FOR BELIEVING AND PROBABLE CAUSE TO BELIEVE— DEFINED

(A person has reasonable grounds to believe a fact exists) (or) (A person has probable cause to believe a fact exists) if a reasonable person under the same or similar circumstances would believe the fact exists.

### Notes on Use

This instruction should be given in conjunction with other Instructions such as 21:7, 21:8, 21:9, 21:10, and 21:11. When given, use whichever parenthesized portions are appropriate.

### Source and Authority

This instruction is supported by **People v. Brown**, 217 P.3d 1252 (Colo. 2009) (probable cause exists when there is a fair probability that defendant committed a crime, based on the facts known to officer at the time of arrest); **People v. King**, 16 P.3d 807 (Colo. 2001) (probable cause not measured by a “more likely true than false” level of certitude but by a nontechnical common-sense standard of reasonable cause to believe); **People v. Davis**, 903 P.2d 1 (Colo. 1995); **People v. McCoy**, 870 P.2d 1231 (Colo. 1994); **People v. Washington**, 865 P.2d 145 (Colo. 1994); **People v. Diaz**, 793 P.2d 1181 (Colo. 1990); **People v. Thompson**, 793 P.2d 1173 (Colo. 1990) (in determining the question of probable cause, probability, as opposed to certainty, is the touchstone of reasonableness and involves probabilities similar to the factual and practical questions of everyday life upon which reasonable and prudent persons act); **People v. Foster**, 788 P.2d 825 (Colo. 1990) (insufficient evidence of probable cause); **People v. Fields**, 785 P.2d 611 (Colo. 1990) (knowledge of fellow officer cannot be used to supply necessary information for probable cause if, at time of the actual arrest, that officer would not have had lawful authority to make an arrest); **People v. Contreras**, 780 P.2d 552 (Colo. 1989) (anonymous informant’s tip corroborated by information gained from independent police investigation sufficient evidence of probable cause under the “totality of the circumstances” test); **People v. Ratcliff**, 778 P.2d 1371 (Colo. 1989) (discusses differences between information required for a valid arrest without a warrant and information required for a valid investigatory stop, i.e., probable cause and reasonable suspicion); **People v. Tufts**, 717 P.2d 485 (Colo. 1986); **People v. Pate**, 705 P.2d 519, 521–22 (Colo. 1985) (“Probability, not certainty, is the touchstone of probable cause. . . . [P]robable cause does not mean mathematical probability [but] must be equated with reasonable grounds . . . [giving due] consideration . . . to the law enforcement officer’s knowledge, experience, and training in determining the significance of his observations.”); **People v. Florez**, 680 P.2d 219 (Colo. 1984) (test is whether facts available to a reason-

ably cautious officer would warrant belief); **People v. Villiard**, 679 P.2d 593 (Colo. 1984) (“probable cause” and “reasonable grounds” are equivalent terms); **People v. Freeman**, 668 P.2d 1371, 1377 (Colo. 1983) (“An officer who does not personally possess sufficient information to constitute probable cause may nevertheless make a valid arrest if he acts upon the direction or as a result of a communication from a fellow officer, and the police, as a whole, possess sufficient information to constitute probable cause.”); **People v. Gouker**, 665 P.2d 113 (Colo. 1983) (outstanding arrest warrant from another state, if valid, may provide the necessary probable cause to make a warrantless arrest in Colorado, even though the detained person is arrested for a different offense, if the arresting officer was aware of and was at least partially motivated by it); **People v. Hazelhurst**, 662 P.2d 1081, 1086 (Colo. 1983) (“In assessing probable cause, the totality of the evidence known to the arresting officer, including information obtained from fellow officers, and such other circumstances as support a conclusion that a crime has been committed, may be considered. Admissibility of the evidence relied upon by the trained police officer is not the test.”); **People v. Roybal**, 655 P.2d 410 (Colo. 1982); **People v. Rueda**, 649 P.2d 1106, 1108–09 (Colo. 1982) (“Probable cause exists where the facts and circumstances within the arresting officer’s knowledge are sufficient to warrant a person of reasonable caution to believe an offense has been or is being committed. . . . Where [the] officer does not directly observe the criminal activity . . . he may rely on information from a trustworthy informant as an appropriate basis for establishing probable cause . . . .”); **Scott v. People**, 166 Colo. 432, 444 P.2d 388 (1968); **Lavato v. People**, 159 Colo. 223, 411 P.2d 328 (1966); **Gonzales v. People**, 156 Colo. 252, 398 P.2d 236 (1965); **Baldwin v. Huber**, 223 P.3d 150 (Colo. App. 2009) (circumstantial evidence provided probable cause, even if evidence might also support other inferences); **People v. Robinson**, 226 P.3d 1145 (Colo. App. 2009) (informant’s reliability, veracity, and basis for knowledge, corroborated by other evidence, adequate to support probable cause); **People v. Holmberg**, 992 P.2d 705 (Colo. App. 1999); **Rose v. City & County of Denver**, 990 P.2d 1120 (Colo. App. 1999); **People v. Fears**, 962 P.2d 272 (Colo. App. 1997); **People v. Quintana**, 701 P.2d 1264 (Colo. App. 1985); **People v. Lesko**, 701 P.2d 638 (Colo. App. 1985); and **People v. Cook**, 665 P.2d 640, 643 (Colo. App. 1983) (“Probable cause may be [based on] hearsay . . . . But, where the information originates from an anonymous informer, the information supplied must contain sufficient facts to establish the basis for [the informer’s] knowledge of criminal activity and also must establish adequate circumstances to justify the officer’s belief in the informer’s credibility or the reliability of the information.”). *See also* § 18-1-707(4), C.R.S.; RESTATEMENT (SECOND) OF TORTS § 119 cmt. j (1965); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.18 (3d ed. 2006).

## 21:14 FRESH PURSUIT—DEFINED

**“Fresh pursuit” means the pursuit without unnecessary delay of a person who has committed a criminal offense, or who is reasonably believed to have committed a criminal offense.**

### Notes on Use

When applicable, this instruction should be used in conjunction with Instruction 21:10, or with Instruction 21:11 or 21:15 when there is a question of the officer’s authority to make an arrest beyond the territorial limits of the officer’s normal authority under section 16-3-106 or section 16-3-104(2), C.R.S.

### Source and Authority

1. This instruction is supported by the statutory definition in section 16-3-104(1)(c) (arrest by a peace officer from another jurisdiction), and **Charnes v. Arnold**, 198 Colo. 362, 600 P.2d 64 (1979) (interpreting section 16-3-104(1)(c)). *See also* RESTATEMENT (SECOND) OF TORTS § 119 cmt. q (1965).

2. Unless the officer was acting under authority conferred by section 16-3-110, C.R.S. (authority of full-time, certified peace officer to make an arrest outside the jurisdiction of the law enforcement agency employing the officer of a person who has or is committing a felony or misdemeanor in the officer’s presence), to make a valid arrest as a peace officer without a warrant under section 16-3-102, C.R.S., outside the territorial limits of the peace officer’s jurisdictional authority, the officer must have been engaged in fresh pursuit as required by sections 16-3-104(2) and 16-3-106. *See* **People v. Wolf**, 635 P.2d 213 (Colo. 1981) (arrests without a warrant); **People v. Hamilton**, 666 P.2d 152 (Colo. 1983) (arrests with a warrant). In the absence of fresh pursuit, public officers acting outside their territorial jurisdictions must obtain the aid of local officers who have authority to make arrests in the “foreign” jurisdiction. It is immaterial, however, who executes the arrest warrant, provided that individuals with lawful authority to make an arrest are actually present at the scene of the arrest and participate in the arrest process. **People v. Florez**, 680 P.2d 219 (Colo. 1984).

3. A police officer in “fresh pursuit” is only authorized to make an extra-territorial warrantless arrest if, at the time the pursued party crosses the territorial boundary, the officer has probable cause to believe that the pursued party has committed a crime. **People v. McKay**, 10 P.3d 704 (Colo. App. 2000).

**21:15 PRIVILEGE TO ARREST WITH A WARRANT**

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (false imprisonment) (false arrest) if the affirmative defense of a privilege to arrest with a warrant is proved (and you do not find such privilege, if any, was abused). This defense is proved if you find all of the following:

(1. The warrant was [valid] [or] [appeared to be valid];)

2. The plaintiff was the person for whose arrest the warrant was issued (or the plaintiff knew that [his] [her] conduct would cause the defendant to assume [he] [she] was);

3. The arrest was made within the territory in which the (court) (official) issuing the warrant had authority to order the arrest;

4. (The defendant had possession of the warrant at the time of the arrest and [he] [she] showed it to the plaintiff immediately upon plaintiff's request, if any) (or) (if defendant did not have possession of the warrant, [he] [she] informed plaintiff of the alleged offense and that a warrant had been issued and that upon the plaintiff's request [he] [she] would show [him] [her] the warrant as soon as possible);

5. The defendant was a person authorized to execute the warrant within the territory where the arrest was made; and

6. The defendant indicated (his) (her) intent to arrest the plaintiff by (his) (her) appearance, words, or conduct (or if the defendant did not have to indicate that intent at the time of the arrest, [he] [she] did so at the first reasonable opportunity).

**Notes on Use**

1. In the first paragraph use whichever parenthesized phrase, "false

imprisonment” or “false arrest,” is more appropriate and omit the parenthesized phrase relating to abuse unless there is evidence to support it.

2. Omit the parenthesized numbered paragraph 1, unless the validity or fairness of the warrant involves a disputed question of fact, such as forgery. If for that reason the paragraph is not omitted, Instruction 21:17 must also be given with this instruction. Part of the proof required to establish that a warrant was valid or fair on its face is that a warrant was in fact issued. If that is a disputed question of fact, paragraph 1 should be used with any necessary modifications.

3. Use whichever remaining parenthesized or bracketed words or phrases are appropriate, and omit any remaining numbered paragraphs, the facts of which are not in dispute.

4. Depending on the circumstances, other appropriate instructions, for example, Instruction 21:16, explaining when an indication of an intent to make an arrest may be excused, should be given with this instruction.

5. Additional instructions dealing with the authority of the court issuing the warrant (numbered paragraph 3) and the authority of the person executing the warrant (numbered paragraph 5) may be required. For that purpose, see Crim. P. 4, 4.1, 4.2, and 9 and section 16-1-104(18), C.R.S. (by definition, a warrant must be issued by a judge of a court of record and be “directed to any peace officer”); section 16-3-106, C.R.S. (authorizing a peace officer, if in fresh pursuit and the alleged offender has crossed a boundary line marking the territorial limit of the officer’s authority, to “pursue him beyond such boundary line and make the arrest”); section 16-2.5-101 to -151, C.R.S. (setting forth various statutory definitions of “peace officer”); section 16-3-108, C.R.S. (issuance of arrest warrant without information or complaint); and section 16-5-205, C.R.S. (issuance of arrest warrants based on indictment, information, or filing of a felony complaint in county court).

6. In cases involving juveniles and persons charged with violation of municipal ordinances or charter provisions, the appropriate counterpart statutes and court rules should be consulted.

7. Numbered paragraph 4 of the instruction sets out the provisions of Crim. P. 4(c)(1)(III), which vary somewhat from older common-law rules. For the common-law rules, see the Source and Authority below.

8. If there is a dispute as to whether the defendant did, in fact, restrict the plaintiff’s freedom of movement by an arrest or otherwise, this instruction must be appropriately modified.

9. Concerning numbered paragraph 5, “it is immaterial who executes the arrest warrant provided that individuals with lawful

authority to make an arrest are actually present at the scene of the arrest and participate in the arrest process.” **People v. Schultz**, 200 Colo. 47, 49, 611 P.2d 977, 979 (1980). *See also* **People v. Florez**, 680 P.2d 219 (Colo. 1984); **People v. Hamilton**, 666 P.2d 152 (Colo. 1983). When otherwise appropriate to the evidence in the case, numbered paragraph 5 should be appropriately modified to reflect the rule of the **Schultz** case.

### Source and Authority

In addition to the authorities discussed above, this instruction is supported generally by RESTATEMENT (SECOND) OF TORTS § 122 (stating the privilege in general); RESTATEMENT § 125 (name of person arrested); RESTATEMENT § 129 (place of arrest); RESTATEMENT § 126 (possession of warrant); RESTATEMENT § 128 (manifestation of intent to arrest and of possession of warrant) (1965); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.17 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 25 (5th ed. 1984). *See also* **Pomeranz v. Class**, 82 Colo. 173, 257 P. 1086 (1927) (in a false imprisonment case, sheriff not liable because warrant fair on its face, but private citizens who knowingly caused issuance of invalid warrant liable).

## **21:16 INDICATION OF INTENT TO ARREST— WHEN EXCUSED**

**A person does not have to indicate an intent to arrest if he or she reasonably believes that:**

- 1. The indication would be dangerous to him or herself or a third person; (or)**
- 2. The indication would be likely to frustrate the arrest; (or)**
- 3. The indication would be useless or unnecessary because the person being arrested would be incapable of understanding it; (or)**
- 4. The person being arrested knows or as a reasonable person should know that he or she is being arrested and for what offense.**

### **Notes on Use**

1. When appropriate, this instruction should be given in conjunction with Instructions 21:10, 21:11, and 21:15.
2. Only such portions of this instruction should be used as are supported by the evidence.
3. For the same reasons an indication of intent to arrest may be excused, the requirement that the defendant indicate the offense or conduct for which the arrest is being made may also be excused. When necessary, this instruction should be appropriately modified to include this rule.

### **Source and Authority**

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 128(2) (1965); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.17, at 361, and § 3.18, at 408 (3d ed. 2006).
2. Numbered paragraph 4 is supported by **People v. Olguin**, 187 Colo. 34, 528 P.2d 234 (1974).

## 21:17 VALID WARRANT OR WARRANT FAIR ON ITS FACE—DEFINED

**To be (valid) (apparently valid), a warrant must be** *(insert those disputed facts the jury must resolve, if any, to determine whether or not the warrant was valid or appeared to be valid).*

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. When appropriate, this instruction should be given with Instruction 21:15.

### Source and Authority

1. This instruction is supported by **Pomeranz v. Class**, 82 Colo. 173, 257 P. 1086 (1927) (elements of a warrant fair on its face); **Harris v. McReynolds**, 10 Colo. App. 532, 51 P. 1016 (1898) (warrant invalid where plaintiff not sufficiently named, though he was the person whose arrest was intended under the warrant); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.17, at 402–405 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 25, at 149–50 (5th ed. 1984). Cf. **Herring v. United States**, 555 U.S.135 (2009) (evidence not excluded in criminal prosecution where warrant that had been recalled but not properly removed from computer records appeared valid to officers); **People v. Mitchell**, 678 P.2d 990 (Colo. 1984) (evidence properly suppressed in a criminal proceeding, though it had been seized as part of an arrest with a warrant, where the warrant was “void from its issuance” because it had been issued on the mistaken assumption that the defendant had not made timely payment of a traffic fine).

2. It is assumed that in most cases only one or two of the requirements of a valid warrant or one fair on its face will be in dispute.

A warrant is valid if:

- a. The plaintiff is sufficiently named or described in the warrant, and it is otherwise regular in form;
- b. The warrant was issued by a court or official having authority to issue a warrant for the conduct which was described in the warrant;
- c. The court or official, at the time of issuing the warrant, had jurisdiction over the person named or described therein;
- d. All proceedings required for the proper issuance of warrants

took place (see rules and statutes cited in Note 5 of Notes on Use to Instruction 21:15); and

- e. The warrant had not expired by a lapse of time from its issuance to the time of arrest.

RESTATEMENT (SECOND) OF TORTS §§ 123, 130(a) (1965).

3. For requirements as to regularity of form, see Crim. P. 4(b)(1) and 9(b)(1).

4. A warrant is fair on its face if:

- a. The plaintiff is sufficiently named or described in the warrant, and it is otherwise regular in form;
- b. The court or official who issued the warrant had authority to issue warrants for the general type of conduct that the plaintiff was charged with;
- c. The facts stated in the warrant, if they all existed, would confer jurisdiction over the person sufficiently named or described therein;
- d. Nothing appears in the warrant to indicate that one or more of the proceedings required for proper issuance had not taken place; and
- e. The warrant has not expired by a lapse of time from its issuance to the time of arrest.

RESTATEMENT §§ 124, 130(a).

**21:18 GUILT OF PERSON ARRESTED**

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), if the affirmative defense of the guilt of the person arrested is proved. This defense is proved if you find the plaintiff (pleaded guilty to) (or) (was convicted of) the criminal offense for which (he) (she) was arrested.

**Notes on Use**

1. Use whichever parenthesized words are appropriate.
2. If there is a dispute as to whether the defendant did in fact restrict the plaintiff's freedom of movement by an arrest or otherwise, this instruction must be appropriately modified.

**Source and Authority**

1. This instruction is supported by **Hushaw v. Dunn**, 62 Colo. 109, 111, 160 P. 1037, 1038 (1916) (“[W]here a person has pleaded guilty or has been convicted of a criminal charge, an action for false imprisonment will not lie. . . . The same rule would seem to be equally applicable where the arrest was for a violation of a municipal ordinance.”); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.18, at 421 (3d ed. 2006).

2. The privilege covered by this instruction does not apply if the conviction was for an offense other than that for which the arrest was made. HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 3.18, at 414; *accord* **Enright v. Groves**, 39 Colo. App. 39, 560 P.2d 851 (1977). *But see* **Land v. Hill**, 644 P.2d 43 (Colo. App. 1981) (distinguishing **Enright** on the grounds that in **Enright** the conduct for which the plaintiff claimed to have been falsely arrested (failure to produce a driver's license) was totally unrelated to that for which the plaintiff was convicted (violation of dog leash law)). In **Land**, on the other hand, the plaintiff's threats toward a third person for which she appears to have been arrested were “part and parcel” of a single course of conduct involving the battery on the same third person to which the plaintiff pleaded guilty.

**21:19 ABUSE OF A PRIVILEGE TO ARREST**

If you find that the defendant, (*name*), had a privilege to arrest the plaintiff, (*name*), (with) (or) (without) a warrant, such a privilege is not a defense if:

(1. The defendant's sole purpose in making the arrest was not to bring the plaintiff before a proper court or official or to secure the administration of the criminal law) (or)

(2. The defendant failed to bring the plaintiff without unnecessary delay before [*insert the court or officer before whom the plaintiff should have been brought*]).

**Notes on Use**

1. Use whichever parenthesized portions are appropriate.
2. For modifications which may be required in this instruction when a child is detained, see sections 19-2-502 and 19-2-503, C.R.S.
3. Paragraph 2 of this Instruction may require modification if a plaintiff was admitted to bail pursuant to section 16-2-111, C.R.S. See **Weld Cty. Court v. Richards**, 812 P.2d 650 (Colo. 1991).

**Source and Authority**

1. Paragraph 1 is supported by RESTATEMENT (SECOND) OF TORTS § 127 (1965); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.18, at 427 (3d ed. 2006).
2. Paragraph 2 is supported by HARPER, JAMES AND GRAY ON TORTS, *supra*, § 3.17, at 427; and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 25, at 150 (5th ed. 1984).
3. Rule 5(a) of the Colorado Rules of Criminal Procedure requires that a person arrested without a warrant or with a warrant be taken without unnecessary delay before the nearest available county or district court. "[Delay caused by] the decision of law enforcement officers to conduct a custodial interrogation of the defendant before presenting him to a judicial officer for a proper advisement of rights . . . is not a 'necessary' delay within the intendment of Crim. P. 5(a)." **People v. Raymer**, 662 P.2d 1066, 1071 (Colo. 1983).
4. Rule 9(c) of the Rules of Criminal Procedure requires that a person arrested with a warrant to be executed under Crim. P. 4(c) be taken before the court without unnecessary delay or, for purpose of

admission to bail, before the clerk of the court, the sheriff of the county where the arrest occurs, or any other officer authorized by law to admit to bail.

5. Under certain circumstances set out in section 42-4-1707, C.R.S., a person arrested for a misdemeanor traffic violation must be taken without unnecessary delay before a county judge who has jurisdiction of the offense as provided by law.

6. Other relevant statutes include section 16-2-112, C.R.S. (peace officer making an arrest without a warrant for a misdemeanor or petty offense is required to take arrested person "without unnecessary delay before the nearest available county or district judge"); section 16-3-104(3), C.R.S. (peace officer of another state making an arrest after a fresh pursuit required to take arrested person without unnecessary delay before "the nearest available judge of a court of record"); and section 16-3-108, C.R.S. (peace officer arresting a person with a warrant not based on an information or complaint required to take arrested person "without unnecessary delay before the nearest judge of a court of record"). *But see* **Richards**, 812 P.2d at 653 (if defendant is arrested and admitted to bail through execution of an appearance bond pursuant to section 16-2-111, the requirements of section 16-2-112 are not applicable).

7. As to the requirements of the Fourth Amendment to the United States Constitution with respect to a prompt judicial determination of probable cause following a warrantless arrest, see **County of Riverside v. McLaughlin**, 500 U.S. 44 (1991) (burden of proof shifts to government to demonstrate existence of a bona fide emergency or other extraordinary circumstance when an individual arrested without a warrant does not receive a judicial determination of probable cause within 48 hours). *See also* **Powell v. Nevada**, 511 U.S. 79 (1994) (four-day delay between warrantless arrest and judicial probable cause hearing was presumptively unreasonable under **McLaughlin's** 48-hour rule).

## CHAPTER 22. DEFAMATION (LIBEL AND SLANDER)

### Introductory Note

- 22:1 Libel or Slander Per Se—Where the Plaintiff Is a Public Official or Public Person or, If a Private Person, the Statement Pertained to a Matter of Public Interest or General Concern—Elements of Liability
- 22:2 Libel or Slander Per Quod—Where the Plaintiff Is a Public Official or Public Person or, If a Private Person, the Statement Pertained to a Matter of Public Interest or General Concern—Elements of Liability
- 22:3 Reckless Disregard Defined—Where the Plaintiff Is a Public Official or Public Person or, If a Private Person, the Statement Pertained to a Matter of Public Interest or General Concern
- 22:4 Libel or Slander Per Se—In a Private Matter Where Plaintiff Is a Private Person—Elements of Liability
- 22:5 Libel or Slander Per Quod—In a Private Matter Where Plaintiff Is a Private Person—Elements of Liability
- 22:6 Incremental Harm
- 22:7 Published—Defined
- 22:8 Defamatory—Defined
- 22:9 About the Plaintiff—Defined
- 22:10 Determination of Meaning of Statement—How Understood by Others
- 22:11 Determination of Meaning of Statement—Publication to Be Considered as a Whole
- 22:12 Determination of Meaning of Statement—Publication to Be Considered in Light of Surrounding Circumstances
- 22:13 False—Defined
- 22:14 Special Damages—Defined
- 22:15 Actual Damage—Defined
- 22:16 Affirmative Defense—Substantial Truth
- 22:17 Affirmative Defense—Absolute Privilege
- 22:18 Affirmative Defense—Qualified Privilege—When Lost
- 22:19 Affirmative Defense—Privilege to Report Official or Public Meeting Proceedings
- 22:20 Affirmative Defense—Privilege to Provider of Means of Communication
- 22:21 Affirmative Defense—Fair Comment
- 22:22 Affirmative Defense—Consent

- 22:23 Affirmative Defense—Statute of Limitations
- 22:24 Repetition by Third Persons as an Element of Damages
- 22:25 Damages—Recovery of
- 22:26 Circumstances that Mitigate Damages
- 22:27 Exemplary or Punitive Damages

### Introductory Note

1. In **New York Times Co. v. Sullivan**, 376 U.S. 254, 279–80 (1964), the Supreme Court held that the guarantees of freedom of speech and press of the First Amendment, made applicable to the states by the Fourteenth Amendment, prohibit a public official “from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” This constitutional privilege was premised on our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open,” and on recognition that erroneous statements are “inevitable” in the discussion of public affairs. *Id.* at 270. In **St. Amant v. Thompson**, 390 U.S. 727, 731 (1968), the Court explained that the term “reckless disregard,” like “actual malice,” is a term of art, and requires evidence that the defendant “in fact entertained serious doubts as to the truth of his publication.” In **Curtis Publishing Co. v. Butts**, 388 U.S. 130 (1967), the Supreme Court extended the rule to cases brought by persons who, although not public officials, are deemed “public figures.”

2. In **Gertz v. Robert Welch, Inc.**, 418 U.S. 323, 347 (1974), the Supreme Court held that although the First Amendment privilege extends to a defamation of a private individual when the defamation relates to a matter of public interest or general concern, “[s]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability.” **Accord Time, Inc. v. Firestone**, 424 U.S. 448 (1976). After the **Gertz** decision, the Colorado Supreme Court decided **Walker v. Colorado Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975). **Walker** was a case brought by a private plaintiff concerning a publication that involved a matter of public interest. The court rejected the negligence standard of liability and adopted the liability standard of **New York Times**, 376 U.S. 254, except that it declined to adopt the **St. Amant** requirement for public officials or public persons, that reckless disregard requires the defendant to have “entertained serious doubts as to the truth.” Subsequently, in **Diversified Management, Inc. v. Denver Post, Inc.**, 653 P.2d 1103 (Colo. 1982), the court overruled this exception in **Walker** and held that the **St. Amant** definition of “reckless disregard” should be used “in cases involving matters of public interest or general concern, as well as in cases involving public officials and public figures.” *Id.* at 1110; *see also* **Shoen v. Shoen**, 2012 COA 207, ¶ 24, 292 P.3d 1224; **Lockett v. Garrett**, 1 P.3d 206 (Colo. App. 1999); **Fink v. Combined**

**Comme'ns Corp.**, 679 P.2d 1108 (Colo. App. 1984); **Willis v. Perry**, 677 P.2d 961 (Colo. App. 1983).

3. The "constitutionalization" of the law of libel under **New York Times** and its progeny also reallocated the traditional roles of a court as an arbiter of law and a court or jury as factfinder in resolving factual issues that involve drawing "line[s] 'between speech unconditionally guaranteed and speech which may legitimately be regulated.'" **N.Y. Times**, 376 U.S. at 285 (quoting **Speiser v. Randall**, 357 U.S. 513, 525 (1958)). In such cases, a reviewing court must "examine for [itself] the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment . . . protect." *Id.* (quoting **Pennkamp v. Florida**, 328 U.S. 331, 335 (1946)). The Colorado Supreme Court has embraced the responsibility doctrine of "independent review," which it characterizes as "de novo" review in cases involving speech arguably protected by the Colorado Constitution. **Walker**, 188 Colo. at 101, 538 P.2d at 459; *see also* **NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr.**, 879 P.2d 6 (Colo. 1994). When performing the function of independent review, courts require that the plaintiff's factual proof on a factual issue of constitutional significance be supported by "convincing clarity," or, as alternatively stated, by "clear and convincing evidence." **DiLeo v. Koltnow**, 200 Colo. 119, 613 P.2d 318 (1980). The "clear and convincing" burden of proof is to be applied by the factfinder and the court when determining the issues of falsity and knowledge of falsity or reckless disregard for the truth. **New York Times**, 376 U.S. at 284–85; **McIntyre v. Jones**, 194 P.3d 519 (Colo. App. 2008); **Barnett v. Denver Publ'g Co.**, 36 P.3d 145 (Colo. App. 2001); **Lockett**, 1 P.3d at 210; **Smiley's Too, Inc. v. Denver Post Corp.**, 935 P.2d 39 (Colo. App. 1996). The clear and convincing burden of proof also applies in cases brought by a public officials or public figures or that involve a matter of public or general concern when a factual issue is presented as to whether the publication is "of and concerning" the plaintiff. **New York Times**, 376 U.S. at 288–89.

4. In **Rowe v. Metz**, 195 Colo. 424, 579 P.2d 83 (1978), the court held the **Gertz** rule (that presumed damages were unconstitutional without proof of actual malice as defined in **New York Times**) did not apply to a case of a private plaintiff and a non-media defendant in a purely private context. In effect, the court in **Rowe** followed the common-law rules of presumed damages in such cases where the defamation is per se. In **Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.**, 472 U.S. 749 (1985), five justices concurred that a state, without violating the First Amend-

ment, may permit a private plaintiff to recover presumed or punitive damages for defamatory statements not involving a matter of public concern without a showing of “actual malice.” Eight justices also specifically agreed that the scope of the First Amendment privilege does not depend on whether the defendant is a news medium.

5. Thus, in Colorado, the **New York Times-St. Amant** rule applies when the plaintiff is a public official or a public person, *see, e.g., DiLeo*, 200 Colo. at 123, 613 P.2d at 321, or when the plaintiff is a private person involved in a matter of public interest or general concern. *See* Instruction 22:3. The pre-**New York Times** common-law rule of presumed damages applies, *see* Instruction 22:4, only when the claimed defamation involves a private matter and the plaintiff is a private person. *See Dun & Bradstreet*, 472 U.S. at 751; **Rowe**, 195 Colo. at 426, 579 P.2d at 85.

6. In **Philadelphia Newspapers, Inc. v. Hepps**, 475 U.S. 767, 768–69 (1986), the Court held that “at least where a newspaper publishes speech of public concern, a private figure-plaintiff cannot recover damages without also showing that the statements at issue are false.” Neither the United States Supreme Court nor any Colorado appellate court has determined whether a private person suing over a private matter is subject to the same requirement. However, the Colorado Supreme Court has rendered decisions suggesting that, even in a purely private defamation action, the federal and/or state constitutions require the plaintiff to prove falsity. In **Bucher v. Roberts**, 198 Colo. 1, 595 P.2d 239 (1979), the court held that the **Gertz** requirement that the statement must be provably false applies to defamation of a private person uttered in a private context. *See also Williams v. Dist. Court*, 866 P.2d 908 (Colo. 1993) (holding that the requirement of **Gertz** that the plaintiff prove fault is applicable in an action by a private person suing over a private communication); **McIntyre**, 194 P.3d at 528 (assuming that private plaintiff suing over private matter must prove falsity); **RESTATEMENT (SECOND) OF TORTS** § 580B cmt. j (1977); Instruction 22:4.

7. Under the common law, an expression of pure opinion could be defamatory and actionable, **RESTATEMENT** § 566 cmt. a, but under the state and federal constitutions, “[b]efore the test of reckless or knowing falsity can be met, there must be a false statement of fact.” **Old Dominion Branch No. 496 v. Austin**, 418 U.S. 264, 284 (1974). The First Amendment protects statements of opinion, “rhetorical hyperbole,” and statements that are either not “verifiable” (i.e., capable of being proven true or false), or cannot reasonably be interpreted as stating actual facts.

**Milkovich v. Lorain J. Co.**, 497 U.S. 1 (1990); **Hepps**, 475 U.S. at 777–78; **Gertz**, 418 U.S. at 340–41. Thus, speech that is pure opinion, mere rhetorical hyperbole, or for other reasons is not susceptible of being proven true or false, cannot provide the basis for defamation liability. *See, e.g., Old Dominion Branch No. 496*, 418 U.S. at 284; **Greenbelt Coop. Publ'g Ass'n v. Bresler**, 398 U.S. 6 (1970); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

8. The Colorado Supreme Court also has recognized the crucial distinction between statements of fact and ideas or opinions that, by definition, can never be false and are unprotected. *See Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994); **NBC Subsidiary (KCNC-TV)**, 879 P.2d at 10–11; **Bucher**, 198 Colo. at 3, 595 P.2d at 241; *see also Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351 (Colo. 1983) (opinions that imply the existence of defamatory factual assertions may support a cause of action in defamation); **Sall v. Barber**, 782 P.2d 1216 (Colo. App. 1989) (opinions that reasonably imply undisclosed defamatory facts as their premise are actionable whereas pure opinion is not); **Brooks v. Paige**, 773 P.2d 1098 (Colo. App. 1988) (rhetorical hyperbole is constitutionally protected speech); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986) (statements were actionable assertions of fact, not opinion); **Reddick v. Craig**, 719 P.2d 340 (Colo. App. 1985) (statement of opinion based upon fully disclosed facts, if true, is not actionable); **Lane v. Ark. Valley Publ'g Co.**, 675 P.2d 747 (Colo. App. 1983) (article implying illegal activity not actionable where it was apparent that article was not meant to be taken literally, but as rhetorical hyperbole expressing an opinion); **Dorr v. C.B. Johnson, Inc.**, 660 P.2d 517 (Colo. App. 1983) (statements of opinion are actionable if they give rise to an inference that there are undisclosed facts that justify the opinion).

9. In **Burns**, 659 P.2d at 1360, the Colorado Supreme Court adopted a three-part analysis for determining whether an utterance is a statement of opinion: first, the allegedly defamatory statement itself must be examined and the court should consider whether it is “phrased in terms of apparency” (e.g., “in my opinion”); second, the statement must be examined in the context of the entire publication; and third, all of the circumstances surrounding the statement, including the medium through which it is disseminated and the audience to which it is directed, should be considered.

10. In **Milkovich**, 497 U.S. at 18–21, the Supreme Court

declined to recognize a separate privilege for protection of speech under the rubric of “opinion,” but instead reaffirmed broad protection for statements, including statements of opinion, that do not convey a factual assertion. To qualify as a “statement of fact,” the defendant’s utterance must convey a factual connotation that is (1) capable of being proven true or false, and (2) reasonably interpreted as stating actual facts about an individual.

11. In **NBC Subsidiary (KCNC-TV)**, 879 P.2d at 10–11, the Colorado Supreme Court recognized the **Milkovich** test that factual assertions must be (1) verifiable, and (2) reasonably understood as an assertion of actual fact. However, the court held that Colorado would continue to utilize the three contextual factors adopted and applied in cases decided before **Milkovich** to determine whether a statement could be reasonably understood to convey a factual proposition: the phrasing, context, and surrounding circumstances of the statement, including medium and audience. In applying these factors, the courts should also consider whether the statement implies the existence of undisclosed facts that support it. The three contextual factors were also applied in **Keohane**, 882 P.2d at 1299, and **Lawson v. Stow**, 2014 COA 26, ¶¶ 33–36, 327 P.3d 340 (defendant’s statement to police officer that he felt personally threatened by Facebook post contained a provably false factual connotation that, if false, is actionable as slander). In **Keohane**, the court observed, with respect to a “letter to the editor” that appeared in the editorial section of the newspaper, that the editorial department was a “traditional forum for debate, where intemperate and highly biased opinions are frequently presented and, absent credentials which make the author particularly credible, often times should not be taken at face value.” 882 P.2d at 1301; *see also* **Giduck v. Niblett**, 2014 COA 86, ¶¶ 38–39, 408 P.3d 856, 868 (statement that plaintiff is a “charlatan” who “exaggerate[d] his resume” is protected opinion when stated “in an online community where anonymous individuals can express highly biased opinions”); **Sky Fun 1, Inc. v. Schuttloffel**, 8 P.3d 570 (Colo. App. 2000) (oral statements that pilot was “not a good pilot” and that he was a “threat to passengers” were sufficiently factual to be susceptible of being proven true or false), *aff’d in part, rev’d in part on other grounds*, 27 P.3d 361 (Colo. 2001); **Lockett**, 1 P.3d at 210–11 (recall petitions charging plaintiff town trustees with “failing to properly represent” and “refusing to be accountable” to citizens by “specifically, violations of the Open Meetings Law,” may be provable as true or false, but purported to be “political opinion as opposed to assertions of fact”); **Arrington v. Palmer**, 971 P.2d 669 (Colo. App. 1998) (statements that plaintiff “physically

threatened" people who disagreed with him could not, in context, be reasonably interpreted as stating actual facts about an individual).

12. When a statement is based on disclosed facts, with no suggestion that it is based on undisclosed information, the statement is "pure opinion" and not a statement of fact. **NBC Subsid. (KCNC-TV)**, 879 P.2d at 9.

13. "[T]he mere use of foul, abusive or vituperative language . . . does not constitute a defamation" when it does not satisfy the "statement of fact" requirement. **Bucher**, 198 Colo. at 4, 595 P.2d at 241; see **Cinquanta v. Burdett**, 154 Colo. 37, 388 P.2d 779 (1963). "[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." **Linn v. United Plant Guard Workers**, 383 U.S. 53, 63 (1966); see also **RESTATEMENT** § 566 cmt. e.

14. Whether allegedly defamatory language is constitutionally privileged as nonfactual in nature "is a question of law and a reviewing court must review the record de novo." **NBC Subsid. (KCNC-TV)**, 879 P.2d at 11; see also **Keohane**, 882 P.2d at 1299 n.8; **Sky Fun 1**, 8 P.3d at 574; **Seible v. Denver Post Corp.**, 782 P.2d 805 (Colo. App. 1989).

**22:1 LIBEL OR SLANDER PER SE—WHERE THE PLAINTIFF IS A PUBLIC OFFICIAL OR PUBLIC PERSON OR, IF A PRIVATE PERSON, THE STATEMENT PERTAINED TO A MATTER OF PUBLIC INTEREST OR GENERAL CONCERN—ELEMENTS OF LIABILITY**

**The plaintiff, (name), claims that the defendant, (name), (published) (or) (caused to be published) the following statement(s):**

*(Insert the text of the statement[s] determined by the court to be defamatory.)*

**For the plaintiff to recover from the defendant on (his) (her) claim of (libel) (slander), you must find that the following elements have been proved by a preponderance of the evidence:**

**1. The defendant (published) (or) (caused to be published) the above statement(s) in the same or substantially similar words; and**

**2. The statement(s) caused the plaintiff actual damage.**

**You must further find that the following elements have been proved by clear and convincing evidence:**

**3. The substance or gist of the (statement was) (statements were) false at the time (it was) (they were) published; and**

**4. At the time of publication, the defendant knew that the (statement was) (statements were) false or the defendant made the statement(s) with reckless disregard as to whether (it was) (they were) false.**

**If you find that the first or second element has not been proved by a preponderance of the evidence or that the third or fourth element has not been**

**proved by clear and convincing evidence, then your verdict must be for the defendant.**

**On the other hand, if you find that the first and second elements have been proved by a preponderance of the evidence and that the third and fourth elements have been proved by clear and convincing evidence, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to the plaintiff's claim]*).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### Notes on Use

1. See the Introductory Note to this Chapter.
2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.
3. Omit any numbered paragraphs, the facts of which are not in dispute.
4. Omit the last two paragraphs if no affirmative defense has been raised or there is insufficient evidence to support such a defense.
5. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.
6. Other instructions defining the terms used in this instruction must be given. *See, e.g.,* Instruction 3:2 (clear and convincing evidence),

Instruction 22:3 (reckless disregard), Instruction 22:7 (published), Instruction 22:13 (false). Even if the court has determined that the publication is libelous per se, Instructions 22:10 (how understood by others) and 22:11 (publication to be considered as a whole) should be given if there remains a factual issue concerning the meaning conveyed by the publication for purposes of determining falsity or damages.

7. If the publication contains an opinion based on disclosed facts, and if the court finds that the supporting factual statements are libelous or slanderous per se, it is those factual statements, and not the opinion, that should be submitted to the jury in this instruction. **NBC Subsid. (KCNC-TV), Inc. v. Living Will Ctr.**, 879 P.2d 6 (Colo. 1994); **RESTATEMENT (SECOND) OF TORTS** § 566 cmt. c (1977); see *Introductory Note*, ¶¶ 7–14.

8. If the statements in issue are part of a larger publication that contains other potentially damaging statements that are not in issue, or if the publication contains more than one defamatory allegation, this instruction should be modified by adding to the third numbered paragraph the following language: “and the false (statement was) (statements were) such that the (publication) (article) (broadcast) as a whole was false.” This clause should not be added when the statement or statements in issue relate to a character trait that is clearly distinct from that referred to in other potentially damaging statements within the publication. See **Masson v. New Yorker Mag., Inc.**, 501 U.S. 496 (1991); **Smiley’s Too, Inc. v. Denver Post Corp.**, 935 P.2d 39 (Colo. App. 1996); see also **Tonnessen v. Denver Publ’g Co.**, 5 P.3d 959 (Colo. App. 2000) (applying the “incremental harm doctrine,” and holding that when harmful but unchallenged or nonactionable statements accompany actionable statements and the “incremental harm” done by the actionable statements is de minimis or nonexistent, recovery is not permitted).

9. Instruction 22:15, defining “actual damage,” should be given with this instruction. In a case of libel per se, it is not necessary to show actual injury to reputation, and emotional injury is sufficient to comply with the “actual damage” requirement. **Keohane v. Stewart**, 882 P.2d 1293 (Colo. 1994).

10. This instruction should be given only when the court has determined (a) that the statement was libelous or slanderous per se, and (b) that at the time of the alleged publication the plaintiff was a public official or public person or, if a private person, that the statement pertained to a matter of public interest or general concern. Otherwise, see Instruction 22:2 (same situation as in this instruction except libel or slander per quod), Instruction 22:4 (libel or slander per se by and concerning private persons in a private matter), or Instruction 22:5 (same situation as 22:4 except libel or slander per quod).

11. Whether a statement is libelous or slanderous per se is to be

determined as a matter of law by the court. **Walker v. Associated Press**, 160 Colo. 361, 417 P.2d 486 (1966); **Lininger v. Knight**, 123 Colo. 213, 226 P.2d 809 (1951); **Knapp v. Post Printing & Publ'g Co.**, 111 Colo. 492, 144 P.2d 981 (1943); **Sky Fun 1, Inc. v. Schuttloffel**, 8 P.3d 570 (Colo. App. 2000), *aff'd in part, rev'd in part on other grounds*, 27 P.3d 361 (Colo. 2001); **Inter-State Detective Bureau, Inc. v. Denver Post, Inc.**, 29 Colo. App. 313, 484 P.2d 131 (1971).

12. The burden of proving that the substance or gist of the statement was false is on the plaintiff, at least when the plaintiff is a public official, public figure, or a private person and the statement relates to a matter of public interest. **Phila. Newspapers, Inc. v. Hepps**, 475 U.S. 767 (1986); see Introductory Note, ¶ 6. For the definition of "false," see Instruction 22:13. As to the burden of proof applicable to a private person suing over statements that relate to private matters, see paragraph 6 of the Introductory Note.

13. The term "actual malice" as used in defamation cases covered by this instruction and by Instruction 22:2 denotes the constitutional standard defined in **New York Times Co. v. Sullivan**, 376 U.S. 254 (1964), and its progeny. The term is entirely different from the common-law concept of malice, in the sense of personal spite, hatred, ill will, or desire to injure. Because the term engenders confusion, "actual malice" is not to be used in jury instructions. **Walker v. Colo. Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975), *overruled on other grounds by Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982). When the **New York Times-St. Amant** rule is applicable, see the Introductory Note, paragraphs 3 and 4. As long as the defendant did not publish the words knowing them to be false or in reckless disregard of their truth, the protection of the rule cannot be lost through other forms of abuse such as (a) excessive publication, (b) publication of other irrelevant defamatory matters, or (c) publication for reasons that, in whole or in part, are extraneous to protecting the public interest. For example, "a charge of criminal conduct against [a candidate or official for public office], no matter how remote in time or place, is always 'relevant to his fitness for office . . . .'" **Ocala Star-Banner Co. v. Damron**, 401 U.S. 295, 300 (1971); see **Monitor Patriot Co. v. Roy**, 401 U.S. 265 (1971). The fact that the defendant may have published the defamation out of "spite, hostility or deliberate intention to harm" does not constitute malice under the First Amendment privilege. **Greenbelt Coop. Publ'g Ass'n v. Bresler**, 398 U.S. 6, 10 (1970); see also **Time, Inc. v. Pape**, 401 U.S. 279 (1971); Notes on Use to Instruction 22:3.

14. Just as the Free Speech Clause of the First Amendment does not create an absolute immunity from liability for defamation of public officials, public figures, or private persons involved in a matter of public concern, neither does the Right of Petition Clause. One exercising a right of petition is not entitled to any greater protection under the First Amendment from liability for defamation than is one exercising the right of free speech. **McDonald v. Smith**, 472 U.S. 479 (1985). However, where the claimed defamation is made as part of an exercise

of the defendant's right to petition government "for a redress of grievances," for example, filing a judicial complaint under C.R.C.P. 106, the court should grant a summary judgment motion against the plaintiff, unless the plaintiff has made a sufficient showing to permit the court to conclude that the alleged defamation was made with actual malice, as defined in Instruction 22:3, and numbered paragraph 4 of this instruction. **Concerned Members of Intermountain Rural Elec. Ass'n v. Dist. Court**, 713 P.2d 923 (Colo. 1986) (applying the standards set out in **Protect Our Mountain Env't, Inc. v. Dist. Court**, 677 P.2d 1361 (Colo. 1984)); *see also* **In re Green**, 11 P.3d 1078 (Colo. 2000) (attorney could not be disciplined for speech criticizing judge because it was protected by the First Amendment).

15. The question whether the person defamed was a "public official," a "public figure," or, as to private individuals, the event involved was a "matter of public interest or general concern," is one of law for the court. **Walker**, 188 Colo. at 102, 538 P.2d at 459; *see also* **Lewis v. McGraw-Hill Broad. Co.**, 832 P.2d 1118 (Colo. App. 1992).

16. Each publication of a libel or slander is a separate cause of action. **Spears Free Clinic & Hosp. v. Maier**, 128 Colo. 263, 261 P.2d 489 (1953); **Lininger**, 123 Colo. at 220, 226 P.2d at 812; **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986). Therefore, if the case involves separate statements made on different occasions, such as more than one article about the plaintiff, each article constitutes a separate claim and should be treated separately in the instructions. It is also advisable, in such cases, to submit special verdict forms for the jury to identify which publication(s) give rise to liability. *See* **Zueger v. Goss**, 2014 COA 61, ¶¶ 23, 24, 343 P.3d 1028; *See, e.g.*, Instructions 4:15 and 4:16. Also, where there are multiple defendants, it may be that not all were involved in the publication of all statements, or that one defendant may be responsible for part, but not all, of an article, such as a headline.

17. Under sections 24-10-105, -106, and -108, C.R.S. (Governmental Immunity Act), a public entity is immune from liability for defamation. **Gray v. City of Manitou Springs**, 43 Colo. App. 60, 598 P.2d 527 (1979).

### Source and Authority

1. This instruction is supported by **Diversified Management, Inc. v. Denver Post, Inc.**, 653 P.2d 1103 (Colo. 1982); and **Walker**, 188 Colo. at 98-100, 538 P.2d at 457-58. *See also* **Rosenbloom v. Metro-media, Inc.**, 403 U.S. 29 (1971); RESTATEMENT (SECOND) OF TORTS §§ 558-581 (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 111-13 (5th ed. 1984).

2. A defamatory statement is libel as opposed to slander if it is written, broadcast, or communicated in some other form having a permanent nature, for example, a picture. RESTATEMENT (SECOND) OF TORTS

§ 568A (1977). Such a statement is libelous per se if no extrinsic evidence or innuendo is necessary to show either its defamatory nature or that it was about the plaintiff. **Denver Publishing Co. v. Bueno**, 54 P.3d 893 (Colo. 2002); **Keohane**, 882 P.2d at 1297 n.3; **Bernstein v. Dun & Bradstreet, Inc.**, 149 Colo. 150, 368 P.2d 780 (1962); **Knapp**, 111 Colo. at 497, 144 P.2d at 984; **Wilson v. Meyer**, 126 P.3d 276 (Colo. App. 2005); **McCammon & Assocs., Inc. v. McGraw-Hill Broad. Co.**, 716 P.2d 490 (Colo. App. 1986); **Lind v. O'Reilly**, 636 P.2d 1319 (Colo. App. 1981); **Inter-State Detective Bureau**, 29 Colo. App. at 317, 484 P.2d at 133. Where a publication is reasonably capable of being construed as defamatory or not defamatory, it is libel per quod and not libel per se. **Morley v. Post Printing & Publ'g Co.**, 84 Colo. 41, 268 P. 540 (1928). In **Bueno**, 54 P.3d at 899, the Colorado Supreme Court examined the elements of the torts of libel and slander in Colorado and declined to recognize the analogous tort of false light invasion of privacy. The court declared that, to sustain a claim for libel per se, a statement also must fall into one of the four categories of slander per se set forth in Paragraph 4 below. Defamatory statements spoken to a reporter and subsequently republished in print constitute libel rather than slander. **Willis v. Perry**, 677 P.2d 961 (Colo. App. 1983).

3. As to the criterion, "public interest or general concern," see **Burns v. McGraw-Hill Broadcasting Co.**, 659 P.2d 1351 (Colo. 1983) (although not an issue on appeal, the newscast of a story detailing the life of a bomb squad officer who was seriously injured in an explosion was analyzed as a matter of public concern); **Diversified Management, Inc.**, 653 P.2d at 1108 (because potential buyers were members of the general public, an article reporting widespread and ongoing real estate development schemes of questionable propriety was a matter of public concern); **Walker**, 188 Colo. at 97, 538 P.2d at 456 (dispute between property owner and antique dealer, when relevant to public interest in failure of legal system to intervene in such disputes, was matter of public concern); **Lawson v. Stow**, 2014 COA 26, ¶¶ 23–26, 327 P.3d 340 (statements made to public employees charged with investigating child abuse relate to a matter of public concern); **Shoen v. Shoen**, 2012 COA 207, ¶¶ 25–27, 292 P.3d 1224 (husband's statements addressing inadequacy of police investigation into his wife's murder, fourteen years earlier, related to matter of public concern); **Smiley's Too**, 935 P.2d at 42 (article about retailer's business practices that affected many consumers and involved a consumer affairs agency was a matter of public concern); **Lewis**, 832 P.2d at 1121 (newscast involving public controversy of racially discriminatory policies and implying plaintiff had been previously arrested was matter of public concern); **Seible v. Denver Post Corp.**, 782 P.2d 805 (Colo. App. 1989) (defendants did not dispute on appeal that allegations of attempts to evade handicapped accessibility requirements of city building code involved a matter of public concern); **Bowers v. Loveland Publ'g Co.**, 773 P.2d 595 (Colo. App. 1988) (news items relaying contents of police report is matter of public concern). On the other hand, the criterion "public interest or general concern" was not met in **Zueger**, 2014 COA 61, ¶ 28 (business dispute between two private parties discussed on Internet); **McIntyre v. Jones**, 194 P.3d 519 (Colo. App. 2008) (statement concerning

qualifications of applicant for bookkeeper of small homeowners association); and **Williams v. Continental Airlines, Inc.**, 943 P.2d 10 (Colo. App. 1996) (statements by flight attendant that pilot attempted to rape her were not matters of public concern).

4. To be slanderous per se the statement must be oral and have imputed to the plaintiff the commission of a crime, the affliction of a loathsome disease, unchastity, or have defamed the plaintiff in the plaintiff's trade, business, profession, or office. **Cinquanta v. Burdett**, 154 Colo. 37, 388 P.2d 779 (1963); **Bernstein**, 149 Colo. at 156, 368 P.2d at 783; **Biggerstaff v. Zimmerman**, 108 Colo. 194, 114 P.2d 1098 (1941); **Kendall v. Lively**, 94 Colo. 483, 31 P.2d 343 (1934); **Sky Fun 1**, 8 P.3d at 574; **Dorr v. C.B. Johnson, Inc.**, 660 P.2d 517 (Colo. App. 1983). The statement also must be such as to require no extrinsic evidence to show how it might be understood as being about the plaintiff or to show how it might be understood as defaming the plaintiff in one or more of the four categories noted above. **Brown v. Barnes**, 133 Colo. 411, 296 P.2d 739 (1956); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986). Further, for a statement to be slanderous per se, it must unequivocally expose the person defamed to public hatred or contempt. **Hayes v. Smith**, 832 P.2d 1022 (Colo. App. 1991) (false accusations of homosexuality are not slander per se).

5. In **Lininger**, 123 Colo. at 214, 226 P.2d at 810, an owner and licensee of a club sued over a citizen's petition to cancel her liquor license (which named the establishment, but not the licensee) because the club was allegedly "a hide-out for people who want to drink and carry on in a manner objectionable to the established morals of this community." The court, applying the rule that "[t]o be libelous per se, the [publication] must contain defamatory words specifically directed at the person claiming injury," held that the petition did not fulfill that requirement, because "[i]t is not ascertainable from the petition who is defamed, and that could be ascertained only by innuendo." *Id.* at 221, 226 P.2d at 813; see also **Wilson**, 126 P.3d at 279 (to be actionable without proof of special damages, a statement "must be, on its face and without extrinsic proof, unmistakably recognized as injurious and specifically directed at the plaintiff"); **Inter-State Detective Bureau**, 29 Colo. App. at 317, 484 P.2d at 133 ("To show that the article was defamatory to the plaintiff, it was necessary for plaintiff to allege, by way of innuendo, that the words were published 'of and concerning the plaintiff' . . . . The office of an innuendo in pleading is to explain the defendant's meaning in the language employed, and also to show how it relates to the plaintiff when that is not clear on its face. Words which require an innuendo are not libelous per se." (citation omitted)). In **Lind**, 636 P.2d at 1320, another division of the court of appeals relied upon **Lininger** and **Inter-State Detective Bureau** in holding that a television news report that showed a picture of plaintiff's home and described it as the home of a "big time drug dealer" was not libelous per se, because "[t]he person referred to can be ascertained only by pleading an innuendo and by

extrinsic proof.” In **Bueno**, 54 P.3d at 900, the Colorado Supreme Court acknowledged its previous holding in **Lininger** that statements not specifically referencing the plaintiff are not libelous per se, but took no position as to whether the trial court properly determined that a publication that did not name the plaintiff was not libelous per se. *But see* **Lee v. Colo. Times, Inc.**, 222 P.3d 957 (Colo. App. 2009) (evidence may be used to prove a publication refers to the plaintiff without rendering the statement defamatory per quod); **Gordon v. Boyles**, 99 P.3d 75, 80 (Colo. App. 2004) (interpreting **Lininger** and **Inter-State Detective Bureau** to require that “[a]lthough defamatory meaning must be apparent from the statement itself for a statement to be defamatory per se, whether the statement is directed at the plaintiff can be established by extrinsic proof without rendering the publication defamatory per quod,” and declining to follow **Lind**). *See generally* 1 SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS § 2:8.3 (5th ed. 2018).

6. Statements that are literally true may still be actionable if they omit crucial facts and, as a result, convey a factually false defamatory meaning. 1 SACK ON DEFAMATION § 3:8. However, when a claim is based upon an inference that could be drawn from accurately stated facts, the First Amendment may bar or limit the claim. **NBC Subsidi. (KCNC-TV)**, 879 P.2d at 14; **Pietrafesa v. D.P.I., Inc.**, 757 P.2d 1113 (Colo. App. 1988). The omission of facts from a publication is not actionable unless “the omitted facts created any material falsity by their omission.” **Fry v. Lee**, 2013 COA 100, ¶ 55, 408 P.3d 843, 854. The claimed false implication can be argued based on the definition of “false” contained in Instruction 22:13 or Instruction 22:16 on “substantial truth.”

7. As stated in **Gertz v. Robert Welch, Inc.**, 418 U.S. 323, 342 (1974), the First Amendment requires that “[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures . . . may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.” For additional definitions of “public figure” or “public official,” see the various opinions cited in the **Gertz** case. *See also* **Wolston v. Reader’s Digest Ass’n**, 443 U.S. 157 (1979); **Hutchinson v. Proxmire**, 443 U.S. 111 (1979); **Time, Inc. v. Firestone**, 424 U.S. 448 (1976); **Curtis Publ’g Co. v. Butts**, 388 U.S. 130 (1967); **Diversified Mgmt., Inc.**, 653 P.2d 1107–08; **DiLeo v. Koltnow**, 200 Colo. 119, 613 P.2d 318 (1980); **Wilson**, 126 P.3d at 283 (candidate for county hospital board seat is public figure); **Hayes**, 832 P.2d at 1024 (public high school teacher is a public official); **Willis**, 677 P.2d at 963 (a police officer is a public official). In **Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.**, 472 U.S. 749 (1985), the Supreme Court declined to determine whether different protections apply to the news media, but held that the **Gertz** rule on presumed or punitive damages does not apply to defamatory publications that are not of public interest.

8. In general, only persons who are defamed and have resulting

injuries, damages, or losses have standing to bring a claim for defamation. **Winter Park Real Estate & Invs., Inc. v. Anderson**, 160 P.3d 399 (Colo. App. 2007).

**22:2 LIBEL OR SLANDER PER QUOD—WHERE  
THE PLAINTIFF IS A PUBLIC OFFICIAL  
OR PUBLIC PERSON OR, IF A PRIVATE  
PERSON, THE STATEMENT PERTAINED  
TO A MATTER OF PUBLIC INTEREST OR  
GENERAL CONCERN—ELEMENTS OF  
LIABILITY**

The plaintiff, (name), claims that the defendant, (name), (published) (or) (caused to be published) the following statement(s):

*(Insert the text of the statement[s] claimed to be defamatory of the plaintiff.)*

For the plaintiff to recover from the defendant on (his) (her) claim of (libel) (slander), you must find by a preponderance of the evidence that:

1. The defendant (published) (or) (caused to be published) the statement(s) set forth above in the same or substantially similar words; and

2. (The) (One or more) (reader[s]) (listener[s]) (viewer[s]) (recipient[s]) of the publication understood the statement to be defamatory; and

3. The publication of the statement(s) caused special damages to the plaintiff.

You must further find by clear and convincing evidence that:

4. The (statement was) (statements were) about the plaintiff;

5. The substance or gist of the (statement was) (statements were) false at the time it was published; and

6. At the time of publication, the defendant knew that the (statement was) (statements were) false or

**the defendant made the statement(s) with reckless disregard as to whether (it was) (they were) false or not.**

**If you find that any one or more of the first, second, or third elements has not been proved by a preponderance of the evidence or that any one or more of the fourth, fifth, or sixth elements has not been proved by clear and convincing evidence, then your verdict must be for the defendant.**

**On the other hand, if you find that the first, second, and third elements have been proved by a preponderance of the evidence and that the fourth, fifth, and sixth elements have been proved by clear and convincing evidence, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to plaintiff's claim]*).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### Notes on Use

1. The Notes on Use to Instruction 22:1 are generally applicable to this instruction.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. This instruction should be given only when the court has determined that: (a) the statement was not libelous or slanderous per se (because extrinsic evidence or innuendo was required either to show how the statement could be understood as being about the plaintiff or

how it could be understood as defaming the plaintiff, or is an oral statement not within the per se categories); (b) the statement is capable of bearing a defamatory meaning; and (c) at the time of the alleged publication, the plaintiff was a public official or public person or, if a private person, that the statement pertained to a matter of public interest or general concern. Otherwise, see Instructions 22:1 (same situation as this instruction except libel or slander per se), 22:4 (libel or slander per se by and concerning private persons in a private matter), or 22:5 (same situation as 22:4 except libel or slander per quod).

4. Where the court has determined that the statement is not libelous or slanderous per se, it is also for the court to determine whether the statement is capable of bearing a particular meaning, and whether that meaning is defamatory. **Fry v. Lee**, 2013 COA 100, ¶ 34, 408 P.3d 843. In making that determination, the court must assess the plain and ordinary meanings of the words considered in the context of the publication as a whole, and in so doing may properly rely on lay dictionary definitions. *Id.* That determination is a question of law in which the court is free to disregard allegations of what the published words mean or how they were understood. *Id.* If the statement is not capable of bearing a defamatory meaning, the claim should be dismissed. If the statement is capable of bearing a defamatory meaning, then it is for the jury to determine whether the statement was so understood by its recipient. RESTATEMENT (SECOND) OF TORTS § 614 (1977); see Notes on Use to Instruction 22:10.

5. If the publication contains an opinion based on disclosed facts, it is those factual statements, and not the opinion, that should be submitted to the jury in this instruction, if the court finds that the supporting factual statements are reasonably capable of bearing a defamatory meaning and are arguably about the plaintiff. See **NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr.**, 879 P.2d 6 (Colo. 1994); RESTATEMENT § 566 cmt. c.

6. If the defamation is per quod and not per se, plaintiff must also plead and prove special damages to establish a claim. See **Bernstein v. Dun & Bradstreet, Inc.**, 149 Colo. 150, 368 P.2d 780 (1962) (libel); **Brown v. Barnes**, 133 Colo. 411, 296 P.2d 739 (1956) (slander); **Lininger v. Knight**, 123 Colo. 213, 226 P.2d 809 (1951) (libel); **Knapp v. Post Printing & Publ'g Co.**, 111 Colo. 492, 144 P.2d 981 (1943) (libel); **Lind v. O'Reilly**, 636 P.2d 1319 (Colo. App. 1981) (libel); **Inter-State Detective Bureau, Inc. v. Denver Post, Inc.**, 29 Colo. App. 313, 484 P.2d 131 (1971) (libel).

7. Instruction 22:14 (defining special damages) should be used with this instruction. For determination of the meaning of the statement, see Instructions 22:10 (how understood by others) and 22:11 (publication to be considered as a whole).

8. Proof by a public official or public figure that the defamation

caused “special damages” will also constitute proof of the “actual damage” such a plaintiff is required to prove in any defamation case under the rule of **New York Times Co. v. Sullivan**, 376 U.S. 254 (1964). Compare Instruction 22:14, with Instruction 22:15.

9. For cases that involve separate statements made on different occasions, such as more than one article about the plaintiff, it is advisable to use a special verdict form. See Note 16 of Notes on Use to Instruction 22:1.

### Source and Authority

This instruction is supported by **Denver Publishing Co. v. Bueno**, 54 P.3d 893 (Colo. 2002). See also **Hayes v. Smith**, 832 P.2d 1022 (Colo. App. 1991); Source and Authority to Instruction 22:1.

**22:3 RECKLESS DISREGARD DEFINED—WHERE THE PLAINTIFF IS A PUBLIC OFFICIAL OR PUBLIC PERSON OR, IF A PRIVATE PERSON, THE STATEMENT PERTAINED TO A MATTER OF PUBLIC INTEREST OR GENERAL CONCERN**

(A statement is) (Statements are) published with reckless disregard when, at the time of publication, the person publishing (it) (them) believes that the (statement is) (statements are) probably false or has serious doubts as to (its) (their) truth.

**Notes on Use**

This instruction must be given whenever Instruction 22:1 or 22:2 is given.

**Source and Authority**

1. This instruction is supported by **Harte-Hanks Communications, Inc. v. Connaughton**, 491 U.S. 657 (1989); **Herbert v. Lando**, 441 U.S. 153 (1979); **Gertz v. Robert Welch, Inc.**, 418 U.S. 323 (1974); **Rosenbloom v. Metromedia, Inc.**, 403 U.S. 29 (1971); **St. Amant v. Thompson**, 390 U.S. 727 (1968); **Garrison v. Louisiana**, 379 U.S. 64 (1964); **Diversified Management, Inc. v. Denver Post, Inc.**, 653 P.2d 1103 (Colo. 1982); **Walker v. Colo. Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975), *overruled on other grounds by Diversified Management, Inc.*, 653 P.2d at 1106.

2. “[T]he knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection . . . . [However], even where the utterance is false, . . . the Constitution . . . preclude[s] attaching adverse consequences to any except the knowing or reckless falsehood.” **Garrison**, 379 U.S. at 73–75. This standard is subjective, narrowly keyed to the defendant’s state of mind at the time of publication rather than to the general propriety of his conduct in publishing. See **Gertz**, 418 U.S. at 327–28; see also **Herbert**, 441 U.S. at 156; **St. Amant v. Thompson**, 390 U.S. 727 (1968).

3. “[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.” **St. Amant**, 390 U.S. at 731. Failure to investigate, see **Beckley Newspapers Corp. v. Hanks**, 389 U.S. 81 (1967); **Curtis Publ’g Co. v. Butts**, 388 U.S. 130 (1967), or mere negligence on the part of the reporter or publisher are “constitutionally insufficient to show the recklessness that is required.” **N.Y. Times Co. v. Sullivan**,

376 U.S. 254, 287 (1964); *see* **Garrison**, 379 U.S. at 79; **Walker**, 188 Colo. at 99, 538 P.2d at 458; **Kuhn v. Tribune-Republican Publ'g Co.**, 637 P.2d 315 (Colo. 1981).

4. In the situations covered by this instruction, so long as the defendant at the time of publication did not publish the statement knowing it was false or with reckless disregard as to whether it was false or not, the plaintiff cannot recover even if there was excessive publication, or publication of other irrelevant defamatory matters, or publication for reasons which are, in whole or in part, extraneous to protecting the public interest. The fact that the defendant may have published the defamation out of “spite, hostility or deliberate intention to harm” does not constitute “actual malice” as interpreted in the First Amendment cases. **Greenbelt Coop. Publ'g Ass'n v. Bresler**, 398 U.S. 6, 10 (1970); *see also* **Time, Inc. v. Pape**, 401 U.S. 279 (1971); **Garrison**, 379 U.S. at 73; **Lewis v. McGraw-Hill Broad. Co.**, 832 P.2d 1118 (Colo. App. 1992).

5. For cases where sufficient evidence supported the jury's verdict under the “clear and convincing” burden of proof, *see* **Air Wis. Airlines Corp. v. Hoeper**, 2012 CO 19 (airline employee's statements to TSA presented a jury question on the issue of reckless disregard) *rev'd, on other grounds*, 134 S. Ct. 652 (2014); **Burns v. McGraw-Hill Broadcasting Co.**, 659 P.2d 1351 (Colo. 1983) (reporter admitted no basis for allegation that wife “deserted” husband, and lacked credibility in denying awareness of obvious pejorative connotation of the word “deserted”); and **Kuhn**, 637 P.2d at 319 (defendant failed to contact and question obvious available sources of corroboration, admitted that he had no basis for most of erroneous allegations, fabricated specific facts appearing in story, and wrote story in manner calculated to create a false factual inference that publisher had uncovered governmental corruption and bribery). The evidence was found insufficient as a matter of law in **DiLeo v. Koltnow**, 200 Colo. 119, 613 P.2d 318 (1980); **Wilson v. Meyer**, 126 P.3d 276, 284 (Colo. App. 2005) (availability of legal defense to charge of criminal eavesdropping did not establish actual malice because record contained no evidence that defendant “was aware of this when he made his statements”); **Lockett v. Garrett**, 1 P.3d 206 (Colo. App. 1999) (no reasonable person could conclude that defendants' petitioning activities were anything more than political opinion); **Pierce v. St. Vrain Valley School District**, 944 P.2d 646 (Colo. App. 1997) (assertion that defendant “should have had serious doubts” about the truth insufficient), *rev'd on other grounds*, 981 P.2d 600 (Colo. 1999); **Lewis**, 832 P.2d at 1123 (“[t]hat a reasonably prudent person would not have published the defamatory statement or would have investigated before reporting does not suffice” to show actual malice); and **Seible v. Denver Post Corp.**, 782 P.2d 805 (Colo. App. 1989) (reporters conducted adequate investigation, verified information, and never doubted truth of article). *See also* **Bowers v. Loveland Publ'g Co.**, 773 P.2d 595, 596 (Colo. App. 1988) (finding “no proof that defendant doubted the truth of its publication”); **Meuser v. Rocky Mountain Hosp.**, 685 P.2d 776 (Colo. App. 1984) (applying same test of “malice” to

determine whether state claim for relief for defamation arising out of labor dispute has or has not been preempted by National Labor Relations Act); **Fink v. Combined Commc'ns Corp.**, 679 P.2d 1108, 1111 (Colo. App. 1984) ("Although a complete failure to investigate sources of corroboration of published statements may be evidence of actual malice, where an adequate investigation is conducted it is unnecessary that the truth of each and every statement be supported by the evidence." (citation omitted)); **Willis v. Perry**, 677 P.2d 961 (Colo. App. 1983); **Lane v. Ark. Valley Publ'g Co.**, 675 P.2d 747, 752-53 (Colo. App. 1983) (to survive summary judgment, plaintiff must present clear and convincing evidence "that the defendant published defamatory falsehoods with actual malice"); **Manuel v. Ft. Collins Newspapers, Inc.**, 661 P.2d 289 (Colo. App. 1982).

6. On the other hand, the defendant "cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true . . . . Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." **St. Amant**, 390 U.S. at 732; *see also* **Herbert**, 441 U.S. at 156-57. Admissible evidence to establish reckless disregard included the fact that the investigation was "grossly inadequate" because the reporter "failed to pursue obvious available sources of possible corroboration or refutation." **Burns**, 659 P.2d at 1361.

**22:4 LIBEL OR SLANDER PER SE—IN A PRIVATE  
MATTER WHERE PLAINTIFF IS A  
PRIVATE PERSON—ELEMENTS OF  
LIABILITY**

The plaintiff, *(name)*, claims that the defendant, *(name)*, *(published)* *(or)* *(caused to be published)* the following statement(s):

*(Insert the text of the statement[s] determined by the court to be defamatory.)*

For the plaintiff to recover from the defendant on *(his)* *(her)* claim for *(libel)* *(slander)*, you must find by a preponderance of the evidence that the defendant *(published)* *(or)* *(caused to be published)* the statement(s) set forth above in the same or substantially similar words.

If you find that this has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that this has been proved, *(then your verdict must be for the plaintiff)* *(then you must consider the defendant's affirmative defense(s) of [insert any affirmative defense that would be a complete defense to the plaintiff's claim]).*

If you find that *(this affirmative defense has)* *(any one or more of these affirmative defenses have)* been proved by a preponderance of the evidence, then your verdict must be for the defendant.

*(In determining whether the affirmative defense of privilege [describe privilege] has been proved, you must also determine whether the defendant abused that privilege as explained in Instruction No. [insert instruction number that corresponds to 22:18].)*

However, if you find that *(this affirmative defense has not)* *(none of these affirmative defenses have)*

**been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. See the Introductory Note to this Chapter.
2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.
3. This instruction should be given only when the court has determined that (a) the statement was libelous or slanderous per se (defamatory on its face and about the plaintiff), and (b) at the time of the alleged publication, the plaintiff was a private person and the statement pertained to a private matter as distinguished from a matter of public interest or general concern. Otherwise, see Instruction 22:1 (libel or slander per se where the plaintiff is a public official or public official or public person, or, if a private person, the statement pertained to a matter of public interest or general concern), Instruction 22:2 (same situation as 22:1 except libel or slander per quod), or Instruction 22:5 (same situation as this 22:4 except libel or slander per quod). Notes 6 and 7 of the Notes on Use for Instruction 22:1 are also applicable to this instruction.
4. As to when a statement is libelous or slanderous per se, see the Notes on Use to Instruction 22:1.
5. Use the next to last paragraph only if a qualified privilege is a potential defense. See Instruction 22:18.
6. Although mitigation of damages is an affirmative defense, see Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.
7. Other appropriate instructions, for example, Instruction 22:7, defining “published,” should be given with this instruction.
8. As to the burden when the statement relates to a private matter, see the Introductory Note, paragraph 6.
9. For cases that involve separate statements made on different occasions, such as more than one article about the plaintiff, it is advisable to use a special verdict form. See Note 16 of Notes on Use to Instruction 22:1.

### Source and Authority

This instruction is supported by **Williams v. District Court**, 866

P.2d 908 (Colo. 1993); and **McIntyre v. Jones**, 194 P.3d 519 (Colo. App. 2008). *See also* Source and Authority to Instruction 22:1.

## 22:5 LIBEL OR SLANDER PER QUOD—IN A PRIVATE MATTER WHERE PLAINTIFF IS A PRIVATE PERSON—ELEMENTS OF LIABILITY

The plaintiff, (*name*), claims that the defendant, (*name*), (published) (or) (caused to be published) the following statement(s):

*(Insert the text of the statement[s] claimed to be defamatory of the plaintiff)*

For the plaintiff to recover from the defendant on (his) (her) claim of (libel) (slander), you must find that the following elements have been proved by a preponderance of the evidence:

1. The defendant (published) (or) (caused to be published) the statement(s) set forth above in the same or substantially similar words;
2. The (statement was) (statements were) defamatory;
3. The (statement was) (statements were) about the plaintiff; and
4. The publication of the statement(s) caused special damages to the plaintiff.

If you find any one or more of these (*number*) elements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these elements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to the plaintiff's claim*]).

If you find that (this affirmative defense has) (any

one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

(In determining whether the affirmative defense of privilege [*describe privilege*] has been proved, you must also determine whether the plaintiff proved by a preponderance of the evidence that the defendant abused that privilege as explained in Instruction No. [*insert instruction number that corresponds to 22:18*].)

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. This instruction should be given only when the court has determined (a) that the statement was not libelous or slanderous per se (because extrinsic evidence was required to show either how the statement could be taken as being “of and concerning” the plaintiff or how it could be defamatory of the plaintiff, or is an oral statement not within the per se categories), (b) that the statement is capable of bearing a defamatory meaning, and (c) that at the time of the alleged publication the plaintiff was a private person and the statement pertained to a private matter as distinguished from a matter of public interest or general concern. Otherwise, see Instruction 22:1 (libel or slander per se where the plaintiff is a public official or public person or, if a private person, the statement pertained to a matter of public interest or general concern), Instruction 22:2 (same situation as 22:1 except libel or slander per quod), or Instruction 22:4 (same situation as this 22:5 except libel or slander per se).

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. As to when a statement is libelous or slanderous per se, rather than being per quod, see the Notes on Use to Instruction 22:1.

4. Omit any numbered paragraph, the facts of which are not in dispute. In the first two paragraphs of the instruction, use whichever parenthesized words are appropriate.

5. Note 8 of the Notes on Use to Instruction 22:1 and Note 5 of the Notes on Use to Instruction 22:2 also apply to this instruction.

6. Other instructions defining the terms used in this instruction must be given. *See, e.g.*, Instructions 22:7 (defining “published”), 22:9 (defining “about the plaintiff”), 22:10 (how understood by others), 22:11 (publication to be considered as a whole), 22:12 (publication to be considered in light of circumstances), 22:14 (defining “special damages”).

7. If the defense of privilege is raised, use the next to last parenthesized paragraph.

8. If other defenses are raised, appropriate modifications must be made in the instruction. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

9. For cases that involve separate statements made on different occasions, such as more than one article about the plaintiff, it is advisable to use a special verdict form. *See* Note 16 of Notes on Use to Instruction 22:1.

### Source and Authority

This instruction is supported by **Gordon v. Boyles**, 99 P.3d 75 (Colo. App. 2004). *See also* Source and Authority to Instruction 22:1.

**22:6 INCREMENTAL HARM**

**No instruction provided at this time.**

**Note**

1. An instruction should be given in cases in which the publication containing the statements in issue contains other statements which the jury could reasonably determine to be as harmful as those for which liability has been found.

2. An instruction should be used in all cases, including those relating to private matters.

3. In **Tonnessen v. Denver Publ'g Co.**, 5 P.3d 959 (Colo. App. 2000), the court adopted the common law defamation damage rule known as the "incremental harm doctrine." Incremental harm measures the incremental harm inflicted by the challenged statements beyond the harm imposed by the rest of the publication. If that harm is determined to be "nominal or non-existent," the plaintiff may not recover. *Id.* at 965.

4. **Tonnessen** and other cases applying the doctrine recognize no distinction between libel or slander that is actionable per se, and for which damages are presumed, and cases of libel per quod. The **Tonnessen** court applied the doctrine to hold a charge of rape, which the court held was defamatory per se, was non-actionable. *Id.* at 964.

**22:7 PUBLISHED—DEFINED**

A statement is “published” when it is communicated (orally) (in writing) to and is understood by some person other than the plaintiff.

**Notes on Use**

1. “Published” applies to all means of communication including words, pictures, and gestures. Consequently, if the alleged defamation was published in some other form than by written or spoken words, this instruction should be appropriately modified.

2. This instruction is applicable to persons who originally published the statement and also (except as to those who only deliver or transmit the statement) to persons who repeat or otherwise republish the statement. *See* Instruction 22:24; *see also* RESTATEMENT (SECOND) OF TORTS § 578 (1977).

3. In cases involving “self-publications,” that is, publications made by the person defamed to third persons, rather than by the defendant or another to such third persons, this instruction must be appropriately modified. Section 13-25-125.5, C.R.S., provides that “[n]o action for libel or slander may be brought or maintained unless the party charged with such defamation has published, either orally or in writing, the defamatory statement to a person other than the person making the allegation of libel or slander. Self-publication, either orally or in writing, of the defamatory statement to a third person by the person making such allegation shall not give rise to a claim for libel or slander against the person who originally communicated the defamatory statement.”

**Source and Authority**

1. This instruction is supported by **Card v. Blakeslee**, 937 P.2d 846 (Colo. App. 1996) (citing RESTATEMENT (SECOND) OF TORTS § 577 (1977)).

2. Publication requires a written or verbal statement; silent adoption of another person’s defamatory statement does not constitute publication. **Wilson v. Meyer**, 126 P.3d 276 (Colo. App. 2005).

## 22:8 DEFAMATORY—DEFINED

A statement is defamatory of a person if it tends to harm the person's reputation by lowering the person in the estimation of at least a substantial and respectable minority of the community.

### Notes on Use

1. This instruction must be given whenever there is a jury question as to whether the statement (or picture, etc.) was defamatory. *See* Instructions 22:2 and 22:5. It is for the court to determine whether a statement is libelous or slanderous per se. **Lininger v. Knight**, 123 Colo. 213, 226 P.2d 809 (1951); *see* Notes on Use to Instruction 22:1. If the statement is determined to be defamatory per se, there is no jury question and this instruction need not be given. If it is determined not to be defamatory per se, then the court must determine whether the statement was reasonably capable of bearing a defamatory meaning. *See* Note 4 of Notes on Use to Instruction 22:2. If the court determines the statement was neither defamatory per se nor reasonably capable of bearing a defamatory meaning, the claim should be dismissed. If the court determined the statement reasonably capable of bearing a defamatory meaning, then the jury must determine whether the statement was understood as defamatory by one or more recipients. RESTATEMENT (SECOND) OF TORTS § 614(2) (1977); *see* Notes on Use to Instruction 22:1.

2. This instruction applies only to statements of fact or to expressions of opinion that imply the allegation of undisclosed defamatory facts as the basis for the opinion, because there is no such thing as a false opinion. *See* Introductory Note, ¶¶ 7–14.

### Source and Authority

1. This instruction is supported by **Tonnessen v. Denver Publishing Co.**, 5 P.3d 959 (Colo. App. 2000). *See also* **Burns v. McGraw-Hill Broad. Co.**, 659 P.2d 1351 (Colo. 1983); RESTATEMENT (SECOND) OF TORTS § 559 (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th ed. 1984). Though the cases frequently use more specific language, such as “hatred, contempt and ridicule,” they generally support this instruction. *See, e.g.*, **Knapp v. Post Printing & Publ’g Co.**, 111 Colo. 492, 144 P.2d 981 (1943); **Morley v. Post Printing & Publ’g Co.**, 84 Colo. 41, 268 P. 540 (1928); **Republican Publ’g Co. v. Mosman**, 15 Colo. 399, 24 P. 1051 (1890).

2. For examples of application of this definition under varying circumstances, *see* **Burns**, 659 P.2d at 1360 (statement that wife “deserted” disabled police officer found defamatory in context); **Cinquanta v. Burdett**, 154 Colo. 37, 388 P.2d 779 (1963) (“crook” or “deadbeat” in context of dispute over a single transaction is not libelous

per se); **Knowlton v. Cervi**, 142 Colo. 394, 350 P.2d 1066 (1960) (citizen's charge that police officer used abusive language not defamatory); **Wertz v. Lawrence**, 69 Colo. 540, 195 P. 647 (1921) (assertion that plaintiff was insane is libelous per se); **Fry v. Lee**, 2013 COA 100, ¶¶ 35–45, 408 P.3d 843 (considering dictionary definitions and the article as a whole, the term “plagiarism” does not necessarily mean that one acted with intent to pass off another's works as one's own and the term “caught up in plagiarism charge” did not convey the defamatory implication that criminal charges had been filed); **Tonnessen**, 5 P.3d at 963 (to be defamatory, statement need only prejudice the plaintiff in the eyes of a substantial and respectable minority of the community); **Arrington v. Palmer**, 971 P.2d 669 (Colo. App. 1998) (statement that plaintiff has physically threatened people who disagreed with him was defamatory per se because it imputed the commission of a criminal offense but constitutionally protected because it could not be reasonably interpreted as stating actual facts); and **Hayes v. Smith**, 832 P.2d 1022 (Colo. App. 1991) (accusation that public schoolteacher was homosexual not slanderous per se).

**22:9 ABOUT THE PLAINTIFF—DEFINED**

A defamatory communication is made about the plaintiff if (the) (one or more) (reader[s]) (viewer[s]) (listener[s]) (recipient[s]) correctly understands, or mistakenly but reasonably understands, that it was intended to refer to the plaintiff.

**Notes on Use**

This instruction should be used when the court has determined that the libel or slander is per quod and not per se.

**Source and Authority**

This instruction is supported by **Keohane v. Stewart**, 882 P.2d 1293 (Colo. 1994); and RESTATEMENT (SECOND) OF TORTS § 564 (1977).

## 22:10 DETERMINATION OF MEANING OF STATEMENT—HOW UNDERSTOOD BY OTHERS

In determining the meaning of a statement and whether the statement defamed the plaintiff, you must consider what the statement meant to the person(s) who (read) (heard) it. You must give the statement its plain and usual meaning. You must make this decision without regard to how the defendant intended the statement to be understood.

### Notes on Use

1. This instruction should be given in conjunction with Instructions 22:9 and 22:2 or 22:5 when the question whether the published statement was defamatory or was “of or concerning,” or “about,” the plaintiff is in issue.

2. If there is a dispute as to whether the defendant made or caused a publication to be made at all, or what the published words were, this instruction must be appropriately modified.

### Source and Authority

This instruction is supported by **Farmers' Life Ins. Co. v. Wehrle**, 63 Colo. 279, 165 P. 763 (1917) (regardless of his intent, defendant cannot avoid what would naturally be inferred to be the meaning of his words); and **Fry v. Lee**, 2013 COA 100, ¶¶ 29–30, 408 P.3d 843. See also **Morley v. Post Printing & Publ'g Co.**, 84 Colo. 41, 268 P. 540 (1928) (insinuation); **Rocky Mtn. News Printing Co. v. Fridborn**, 46 Colo. 440, 104 P. 956 (1909) (words that ordinarily imply defamatory meaning may not be defamatory if used and understood in a nondefamatory sense); 2 F. HARPER, ET AL., HARPER, JAMES, AND GRAY ON TORTS § 5.4 (3rd ed. 2006); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 780–83, and § 113, at 808–10 (5th ed. 1984).

## 22:11 DETERMINATION OF MEANING OF STATEMENT—PUBLICATION TO BE CONSIDERED AS A WHOLE

In determining the meaning of a statement and whether the statement defamed the plaintiff, you must consider the (statement) (publication) (article) (broadcast) (communication) as a whole. You must not dwell upon specific parts of the (statement) (publication) (article) (broadcast) (communication). You must give each part its proper weight and give the entire (statement) (publication) (article) (broadcast) (communication) the meaning that people of average intelligence and understanding would give it.

### Notes on Use

1. This instruction should be given with Instructions 22:9 and 22:10 and with Instruction 22:2 or 22:5 when the issue is whether the published statement, publication, article, broadcast, or communication was defamatory or was “of or concerning” or “about” the plaintiff.

2. If there is a dispute as to whether the defendant made or caused a publication at all, or what the published words were, this instruction must be appropriately modified.

### Source and Authority

This instruction is supported by **Keohane v. Stewart**, 882 P.2d 1293 (Colo. 1994). *See also* **Burns v. McGraw-Hill Broad. Co.**, 659 P.2d 1351 (Colo. 1983); **Fry v. Lee**, 2013 COA 100, ¶ 34, 408 P.3d 843; **Wilson v. Meyer**, 126 P.3d 276 (Colo. App. 2005); **Tonnessen v. Denver Publ’g Co.**, 5 P.3d 959 (Colo. App. 2000); RESTATEMENT (SECOND) OF TORTS § 564 (1977).

## 22:12 DETERMINATION OF MEANING OF STATEMENT—PUBLICATION TO BE CONSIDERED IN LIGHT OF SURROUNDING CIRCUMSTANCES

In determining the meaning of a statement and whether the statement defamed the plaintiff, you must consider the (statement) (publication) (article) (broadcast) (communication) in light of the surrounding circumstances. The circumstances that may affect the manner in which words are understood include (the section of the newspaper or other publication in which they appear) (the type of program or production in which they occur) (the nature of the discussion in which they occur) *(insert other description of surrounding circumstances established by the evidence)* and the likely expectations of readers, listeners, or viewers of the statement(s) as a result of those circumstances.

### Notes on Use

1. Omit material in parentheses that does not correspond to the evidence and add descriptions of other relevant circumstances established by the evidence.

2. This instruction should be given with Instructions 22:9, 22:10, and 22:11, and with Instruction 22:2 or 22:5 when the issue is whether the published statement, publication, article, broadcast, or communication was defamatory or was “of and concerning” or “about” the plaintiff.

3. If there is a dispute as to whether the defendant made or caused a publication at all, or what the published words were, this instruction should be modified to focus the jury upon the words and statements(s) they have found were made by the defendant.

### Source and Authority

This instruction is supported by *Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994); *NBC Subsidiary (KCNC-TV), Inc. v. Living Will Center*, 879 P.2d 6 (Colo. 1994); *Cinquanta v. Burdett*, 154 Colo. 37, 388 P.2d 779 (1963); *Seefried v. Hummel*, 148 P.3d 184 (Colo. App. 2005); and RESTATEMENT (SECOND) OF TORTS § 563 cmt. b.

**22:13 FALSE—DEFINED**

A statement is false if its substance or gist is contrary to the true facts, and reasonable people (hearing) (reading) (or) (learning of) the statement would be likely to think significantly less favorably about the person referred to than they would if they knew the true facts. The fact that a statement may have contained some false information does not necessarily make the substance or gist of the statement itself false.

**Notes on Use**

1. When the truth of the statement is in issue and the plaintiff is a public official or public figure, or is a private person and the statement relates to a matter of public concern, the burden of proving falsity is on the plaintiff. **Phila. Newspapers, Inc. v. Hepps**, 475 U.S. 767 (1986). As to the burden when the statement relates to a private matter, see the Introductory Note, paragraph 6.

2. This instruction should be used in conjunction with Instruction 22:1 or 22:2.

**Source and Authority**

1. This instruction is supported by **Masson v. New Yorker Magazine, Inc.**, 501 U.S. 496, 518 (1991) (falsity under the Constitution requires substantial departure from truth “bearing upon [the] defamatory character” of the words in issue). *Cf. Smiley’s Too, Inc. v. Denver Post Corp.*, 935 P.2d 39 (Colo. App. 1996); *see also* Source and Authority to Instruction 22:16.

2. In **Pierce v. St. Vrain Valley Sch. Dist.**, 944 P.2d 646, 648 (Colo. App. 1997), *rev’d on other grounds*, 981 P.2d 600 (Colo. 1999), the parties entered a confidential settlement agreement and the plaintiff resigned from the school district following sexual harassment allegations. Several weeks later, a newspaper article quoted “a source close to the deal” and indicated that there had been a basis for the allegations. *Id.* The court held that “the truthfulness of the harassment allegations themselves is not at issue . . . . Rather, plaintiff’s defamation claim concerns only the truth of the factual statements in the newspaper article that ‘allegations of sexual harassment were made.’” *Id.* at 651.

3. To be actionable, an allegedly defamatory statement must contain a material falsehood. **Fry v. Lee**, 2013 COA 100, ¶ 50, 408 P.3d 843. The court applies the plain and ordinary meaning of the challenged

statements to determine whether the complaint has demonstrated a material falsity in the communication as a whole, including whether the omission of facts creates a material falsity. *Id.* at ¶¶ 51–56. *See also* Note 4 of Notes on Use to Instruction 22:2. In **Barnett v. Denver Publishing Co.**, 36 P.3d 145, 147–48 (Colo. App. 2001), the court of appeals held that a published statement that the plaintiff had been “convicted in a stalking incident” was substantially true, when the court record showed that the plaintiff had been convicted for the misdemeanor of harassment, and that the judge said during the sentencing hearing that plaintiff’s conduct directed at his paramour was “almost stalking.”

4. When the plaintiff is a public official or public figure, or is a private person and the statement relates to a matter of public concern, the plaintiff’s burden of proving falsity is required by the First Amendment. **Hepps**, 475 U.S. at 775–76. The Colorado Supreme Court has held that constitutionally imposed elements of a defamation claim must meet the standard of “clear and convincing evidence,” and are subject to de novo review by the court. *See NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr.*, 879 P.2d 6 (Colo. 1994) (applying those standards to the question of whether defendant’s omission of facts from its publication gave rise to false factual meaning); *see also Fry v. Lee*, 2013 COA 100, ¶ 21, 408 P.3d 843 (“Where, as here, a defamation claim involves a public figure or a matter of public concern . . . the plaintiff is required to prove the publication’s falsity by clear and convincing evidence.”); **Shoen v. Shoen**, 2012 COA 207, ¶ 24, 292 P.3d 1224 (same); **McIntyre v. Jones**, 194 P.3d 519 (Colo. App. 2008) (same); **Barnett**, 36 P.3d at 147–48 (applying de novo review standard to a complaint and determining as a matter of law that defendant’s publication was substantially true); **Smiley’s Too**, 935 P.2d at 41 (heightened constitutional burden requires plaintiff to prove falsity by clear and convincing evidence).

**22:14 SPECIAL DAMAGES—DEFINED**

“Special damages” are limited to specific monetary losses, if any, which plaintiff had as a result of defendant’s statement(s). Special damages do not include injuries to plaintiff’s reputation or feelings which do not result in specific monetary loss.

**Notes on Use**

1. This instruction should be given in conjunction with Instruction 22:2 or 22:5 whenever the existence of special damages is in issue. It should not be used with Instruction 22:1 or 22:4, dealing with libel or slander per se, where special damages are not required for recovery.

2. If there is a dispute as to whether the defendant made or caused a publication at all, this instruction must be appropriately modified.

3. If the plaintiff establishes his or her case by proving special damages, the plaintiff may also recover nonpecuniary damages included under general damages. *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 112, at 794 (5th ed. 1984); *see* Instruction 22:25.

4. This instruction is also applicable to the tort of product disparagement. *Teilhaver Mfg. Co. v. Unarco Materials Storage, Inc.*, 791 P.2d 1164 (Colo. App. 1989).

**Source and Authority**

1. This instruction is supported by *Brown v. Barnes*, 133 Colo. 411, 296 P.2d 739 (1956) (in a per quod action the plaintiff must establish the causal connection between the defamatory words and any special damages); and *Lind v. O'Reilly*, 636 P.2d 1319 (Colo. App. 1981) (citing this instruction). *See also* RESTATEMENT (SECOND) OF TORTS § 575 (1977); *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 112, at 793–94 (5th ed. 1984); 2 *F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS* § 5.14 (3d ed. 2006).

2. For additional cases on the general subject of pleading and proving special damages in defamation actions, *see* *Bernstein v. Dun & Bradstreet, Inc.*, 149 Colo. 150, 368 P.2d 780 (1962); *Knapp v. Post Printing & Publishing Co.*, 111 Colo. 492, 144 P.2d 981 (1943); *Coulter v. Barnes*, 71 Colo. 243, 205 P. 943 (1922); and *Inter-State Detective Bureau, Inc. v. Denver Post, Inc.*, 29 Colo. App. 313, 484 P.2d 131 (1971). *See also* C.R.C.P. 9(g).

**22:15 ACTUAL DAMAGE—DEFINED**

**“Actual damage”** includes any (impairment of the plaintiff’s reputation) (personal humiliation) (mental anguish and suffering) (physical suffering) (injury to the plaintiff’s credit standing) (loss of income) (*insert any other elements of compensable actual damage of which there is sufficient evidence*).

**Notes on Use**

1. This instruction must be given as an element of the plaintiff’s claim for relief when Instruction 22:1 is given and the plaintiff is a public official or public person. It is not, however, an element of a private person’s claim for relief under Instruction 22:1. *See* Note 9 of the Notes on Use to Instruction 22:1.

2. For the damage instruction generally applicable in defamation cases, see Instruction 22:25.

**Source and Authority**

This instruction is supported by **New York Times Co. v. Sullivan**, 376 U.S. 254 (1964); **Gertz v. Robert Welch, Inc.**, 418 U.S. 323 (1974); and **Walker v. Colorado Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975), *overruled on other grounds by Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982). *See also* RESTATEMENT (SECOND) OF TORTS §§ 621–23 (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 112, at 794; § 116A, at 842–45 (5th ed. 1984); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 5.30 (3d ed. 2006).

## 22:16 AFFIRMATIVE DEFENSE—SUBSTANTIAL TRUTH

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (libel) (slander), if the affirmative defense of substantial truth is proved. This defense is proved if you find the statement(s) published by the defendant (was) (were) substantially true. A statement is substantially true if its substance or gist is true. Substantial truth does not require every word to be true.

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. If there is a dispute as to whether the defendant published the statement, this instruction must be appropriately modified.
3. This instruction should be given only in conjunction with Instruction 22:4 or 22:5, when the question of truth has been put in issue, either (1) because the defendant in the answer pleaded truth in justification and presented some evidence in support of the plea, or (2) because the plaintiff alleged that the words were untrue and the defendant in the answer denied the allegations and then presented some evidence to prove truth. *See Hadden v. Gateway W. Publ'g Co.*, 130 Colo. 73, 273 P.2d 733 (1954) (giving instructions on truth as a defense not error where plaintiff alleged publication was "untrue" and defendants denied the allegation); *Republican Publ'g Co. v. Miner*, 12 Colo. 77, 20 P. 345 (1888) (instruction on defense of truth not to be given where defendant neither pleaded nor attempted to prove truth).
4. This instruction should be given only if the court determines that a private plaintiff suing over a private matter is not required to prove falsity. *See* Introductory Note, ¶ 5. This instruction should not be given in conjunction with Instruction 22:1 or 22:2, because in those cases, the burden of proving falsity is on the plaintiff.
5. This instruction embodies the Colorado rule requiring that the defense of truth requires the defendant to establish only that the "gist" or "sting" of the matter is true. *See* Note 8 of the Notes on Use to Instruction 22:1 and Instruction 22:13.

### Source and Authority

This instruction is supported by Colo. Const. art. II, § 10; section 13-25-125, C.R.S.; and *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). *See also Gomba v. McLaughlin*, 180 Colo. 232, 504 P.2d

337 (1972); **Coulter v. Barnes**, 71 Colo. 243, 205 P. 943 (1922); **SG Interests I, Ltd. v. Kolbenschlager**, 2019 COA 115, ¶¶ 21–22, 452 P.3d 1, 6 (“[T]he alleged misstatement must be likely to cause reasonable people to think ‘significantly less favorably’ about the plaintiff than they would if they knew the truth; a misstatement is not actionable if the comparative harm to the plaintiff’s reputation is real but only modest.” (citation omitted)); **Barnett v. Denver Publ’g Co.**, 36 P.3d 145 (Colo. App. 2001); **Pierce v. St. Vrain Valley Sch. Dist.**, 944 P.2d 646 (Colo. App. 1997), *rev’d on other grounds*, 981 P.2d 600 (Colo. 1999); **Smiley’s Too, Inc. v. Denver Post Corp.**, 935 P.2d 39 (Colo. App. 1996); **Lindemuth v. Jefferson Cnty. Sch. Dist. R-1**, 765 P.2d 1057 (Colo. App. 1988); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986); RESTATEMENT (SECOND) OF TORTS § 581A (1977); 2 F. HARPER, ET AL., HARPER, JAMES, AND GRAY ON TORTS § 5.20 (3d ed. 2006); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 116 (5th ed. 1984).

## 22:17 AFFIRMATIVE DEFENSE—ABSOLUTE PRIVILEGE

**No instruction prepared.**

### Note

1. No instruction has been prepared because it is unlikely that there will be any fact question for determination by a jury as distinguished from questions of law to be decided by the court.

2. Certain classes of persons, by virtue of their position or status, are absolutely privileged to publish defamatory matter and are not liable even if the statements are false or defamatory. An absolute privilege is not conditioned on any knowledge or belief as to the truth of the statements or upon an absence of ill will on the part of the actor. Those absolutely privileged include: (a) a judge or other officers performing a judicial function if the publication has some relation to the matter before that person; (b) an attorney, party, witness, or juror, if the defamatory matter communicated has some relation to a judicial proceeding in which that person participates; (c) legislators in the performance of their legislative functions; (d) witnesses testifying at or persons providing communication preliminary to a legislative proceeding if the matter has some relation to the proceeding; (e) certain executive and administrative officers in communications made in the performance of their official duties; (f) one who is required by law to publish the defamatory matter; and (g) persons in a statutory confidential relationship. RESTATEMENT (SECOND) OF TORTS §§ 585–592A (1977); see **Hoffler v. Colo. Dep’t of Corr.**, 27 P.3d 371 (Colo. 2001) (recognized common-law privilege protecting statements made in course of judicial or quasi-judicial proceedings, but privilege not applicable to employee who made conflicting statements during investigation of supervisor); **McDonald v. Lakewood Country Club**, 170 Colo. 355, 461 P.2d 437 (1969) (recognizing privilege of prosecutor to make defamatory statement in open court when pertinent to case being tried); **Lininger v. Knight**, 123 Colo. 213, 226 P.2d 809 (1951) (petition to county commissioners held privileged as relating to legislative and judicial proceedings); **Glasson v. Bowen**, 84 Colo. 57, 267 P. 1066 (1928) (affidavit incident to change of venue motion); **Burke v. Greene**, 963 P.2d 1119 (Colo. App. 1998) (statements in reports to police are protected by a qualified but not an absolute privilege); **Club Valencia Homeowners Ass’n v. Valencia Assocs.**, 712 P.2d 1024 (Colo. App. 1985) (absolute privilege of attorney to publish defamatory statements in course of judicial proceeding is not limited to statements made during trial, but includes statements made in conferences and other communications preliminary to official proceedings); **Dep’t of Admin. v. State Personnel Bd.**, 703 P.2d 595 (Colo. App. 1985) (rule that defamatory statements made in judicial or quasi-judicial proceedings are absolutely privileged, if relevant to the subject of the inquiry, also applies to hearings before

administrative agencies); **Dorr v. C.B. Johnson, Inc.**, 660 P.2d 517 (Colo. App. 1983) (statements concerning employee in required state agency report are privileged, but privilege does not extend to repetition of statements made to third persons not involved in matter before agency).

3. This defense is applicable regardless of whether the plaintiff is a public official, public figure, or private person.

## 22:18 AFFIRMATIVE DEFENSE—QUALIFIED PRIVILEGE—WHEN LOST

(When the defendant published the statement[s] in question [he] [she] was privileged to do so, because *[describe the basic purpose of the privilege, including what and whose interest the privilege is intended to protect, e.g., “an employee is allowed to inform his or her employer of wrongdoing of a fellow employee for the purpose of protecting the employer’s business”]*.)

(The defendant has the burden of proving the affirmative defense of privilege. If you find that *[describe the facts which, if proved, would give rise to the privilege as a matter of law]*, then you must find that when the defendant published the statement[s] in question, [he] [she] was privileged to do so because *[describe the purpose of the privilege, including what and whose interest the privilege is intended to protect]*.)

(Because) (If) the defendant was privileged to publish the statement(s), then the defendant is not legally responsible to the plaintiff and your verdict must be for the defendant (unless the defendant abused the privilege. The existence of a privilege does not protect the defendant if [he] [she] abused the privilege).

(The affirmative defense of privilege is lost if the plaintiff proves the defendant abused the privilege. The defendant abused the privilege if you find that when [he] [she] published the statement[s] in question:

1. [He] [She] knew the statement[s] to be false, or acted with reckless disregard for whether the statement[s] [was] [were] false; or

2. [He] [She] acted primarily for purposes other than the protection of the interest for which the privilege was given; or

3. [He] [She] knowingly published the statement[s] to [a person] [persons] to whom its publication was not otherwise privileged, unless [he] [she] reasonably believed that the publication was a proper means of communicating such matter to the person[s] to whom its publication was privileged; or

4. [He] [She] did not reasonably believe the publication of the statement[s] to be necessary to accomplish the purpose for which the privilege was given.)

### Notes on Use

1. This instruction should be given only in conjunction with Instruction 22:4 or 22:5 when the question of a qualified privilege has been properly put in issue. It should not be used in conjunction with Instruction 22:1 or 22:2.

2. Use whichever parenthesized or bracketed words or phrases are appropriate.

3. There are certain occasions making a publication conditionally or qualifiedly privileged, and on these occasions the publisher is not liable even for false or defamatory statements unless the privilege is abused. Examples of qualified privileged occasions include: (1) protection of the publisher's interest; (2) protection of the interest of the recipient or a third person; (3) common interest; (4) family relationships; (5) communication to one who may act in the public interest; (6) communication by an inferior state officer required or permitted in the performance of his official duties. See RESTATEMENT (SECOND) OF TORTS §§ 593, 598A (1977).

4. It is a question of law for the court to determine what circumstances will give rise to a privilege, but if there is a dispute as to whether those circumstances in fact existed in the particular case, or whether a privilege, if established, was abused, these questions are for the jury. See *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972); *Ling v. Whittemore*, 140 Colo. 247, 343 P.2d 1048 (1959); *McIntyre v. Jones*, 194 P.3d 519 (Colo. App. 2008); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 5.29 (3d ed. 2006). If the circumstances surrounding defendant's claimed privilege are sufficient as a matter of law, and the existence of those circumstances is not in dispute, then the first parenthesized paragraph of this instruction should be used and the second omitted; if the circumstances would be sufficient for a privilege, but their existence is in dispute, then, assuming there is sufficient evidence from which the jury might

find such circumstances to have existed, the second parenthesized paragraph should be used and the first omitted.

5. None of the remaining portions of this instruction relating to abuse should be given unless there is sufficient evidence to support such portions and the privilege is a conditional one which is subject to being lost if abused. For a discussion of what circumstances will give rise to a privilege, whether absolute or conditional, see HARPER, JAMES, AND GRAY ON TORTS, *supra*, §§ 5.21–5.26 and 5.28 (referring to § 5.8); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 114–115 (5th ed. 1984). *See also* § 18-4-407, C.R.S. (detention of theft suspect); § 25-1-122(3), C.R.S. (persons reporting various diseases).

6. The burden of proving an occasion was privileged, if the facts are in dispute, is on the defendant, but the burden of proving a privilege was abused is on the plaintiff. PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 115, at 835; *see also* **Churchey v. Adolph Coors Co.**, 759 P.2d 1336, 1346 (Colo. 1988) (burden of proving abuse is on the plaintiff); **Price v. Conoco, Inc.**, 748 P.2d 349 (Colo. App. 1987) (citing this instruction and stating that plaintiff bears burden of proving the privilege has been abused); **Patane v. Broadmoor Hotel, Inc.**, 708 P.2d 473 (Colo. App. 1985) (burden of proving abuse on plaintiff, citing this instruction); **Dominguez v. Babcock**, 696 P.2d 338 (Colo. App. 1984) (burden on plaintiff to prove abuse of qualified privilege; failure to investigate or negligence alone not sufficient to establish abuse), *aff'd*, 727 P.2d 362 (Colo. 1986).

7. The conditions set out in this instruction as to how a conditional privilege may be lost are those which are generally applicable to conditional privileges. *See* RESTATEMENT (SECOND) OF TORTS §§ 599–605A (1977); HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 5.27; PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 115, at 832–35. If such conditions are not applicable or other circumstances which may constitute abuse under the applicable law are in issue, this portion of the instruction should be appropriately modified.

8. Usually an employee's state law defamation claim against his or her employer for statements made in the course of disciplinary or grievance proceedings under a collective bargaining agreement will not be preempted by federal labor laws or by any national labor policy. However, the employer's statements are protected by a qualified privilege which requires the employee, in order to recover, to prove "malice" as defined in Instruction 22:3. In such cases, this instruction must be appropriately modified. *See, e.g.,* **Thompson v. Pub. Serv. Co.**, 800 P.2d 1299 (Colo. 1990).

9. When a statement is subject to a qualified privilege, plaintiff has the burden of proving that the statement was false. **Williams v. Boyle**, 72 P.3d 392 (Colo. App. 2003) (also holding that physician's diagnosis entered in medical records is subject to qualified, but not absolute, privilege); *see also* Introductory Note, ¶ 6; Instruction 22:13.

### Source and Authority

1. This instruction is supported by **Churchey v. Adolph Coors Co.**, 759 P.2d 1336 (Colo. 1988) (qualified privilege of employer to communicate to employee reasons for discharging that employee); and **Dominguez v. Babcock**, 727 P.2d 362 (Colo. 1986) (privilege based on common interest; abused if made with "malice" as defined in numbered paragraph 1 of instruction). *See also* **Abrahamsen v. Mountain States Tel. & Tel. Co.**, 177 Colo. 422, 494 P.2d 1287 (1972) (interoffice communications); **Coopersmith v. Williams**, 468 P.2d 739, 741 (Colo. 1970) (In analyzing letter from Boy Scout father to Scout committee, court stated, "a qualified privilege is extended to a communication upon any subject in which the communicating party has a legitimate interest to persons having a corresponding interest. In such a situation the burden of proving the existence of malice passes to the person claiming to be defamed."); **Ling v. Whittemore**, 140 Colo. 247, 343 P.2d 1048 (1959) (reporting theft of car to landlady); **Bereman v. Power Publ'g Co.**, 93 Colo. 581, 27 P.2d 749 (1933) (recognizing qualified privilege of newspaper devoted to particular organization; burden on plaintiff to prove abuse; privilege abused if defendant deliberately adopts a method of communication that gives unnecessary publicity to the defamatory statements or uses defamatory language not warranted by the occasion); **Walker v. Hunter**, 86 Colo. 483, 283 P. 48 (1929) (petition to county commissioners regarding denial of dance hall license); **La Plant v. Hyman**, 66 Colo. 128, 180 P. 83 (1919) (letter from stockholder to other stockholders privileged; directed verdict for defendant proper where plaintiff failed to produce evidence of abuse); **Wertz v. Lawrence**, 66 Colo. 55, 179 P. 813 (1919) (oral statement about teacher made by one parent to another parent, rather than to school board, held not privileged); **Melcher v. Beeler**, 48 Colo. 233, 110 P. 181 (1910) (letter of reference privileged unless privilege abused because defendant lacked belief in truth of his defamatory statements; unless circumstances of privilege in dispute, it is entirely a question for the court whether a privilege exists); **Denver Pub. Warehouse Co. v. Holloway**, 34 Colo. 432, 83 P. 131 (1905) (letter from one corporate officer to another privileged; not abused if defendant has honest belief in truth and does not include defamatory language not appropriate to the occasion); **McIntyre**, 194 P.3d at 529-30 (defendant abused and lost qualified common interest privilege to publish statements because he acted with reckless disregard for the truth by failing to check with knowledgeable sources regarding the facts); **Burke v. Greene**, 963 P.2d 1119 (Colo. App. 1998) (statements made to law enforcement officials are entitled to qualified privilege that can be overcome by showing actual malice); **Wigger v. McKee**, 809 P.2d 999 (Colo. App. 1990) (in absence of bad faith, social worker's statements to therapist regarding possible sexual assault on child by plaintiff were privileged); **Price v. Conoco, Inc.**, 748 P.2d 349 (Colo. App. 1987) (recognizing qualified privilege based on common interest of employers and employees in information concerning work performance and status of personnel); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986) (former employer privileged to respond to inquiries about former employee, but privilege

abused if response made with “malice”); **Patane v. Broadmoor Hotel, Inc.**, 708 P.2d 473 (Colo. App. 1985) (communication to employees relating to their common interest in turnover or status of personnel); **MacLarty v. Whiteford**, 30 Colo. App. 378, 496 P.2d 1071 (1972) (recognizing privilege of one asked to provide character reference to officials in proceedings for application of liquor license); **Hoover v. Jordan**, 27 Colo. App. 515, 150 P. 333 (1915) (petition to school board regarding teacher; qualified privilege abused if publication is excessive); **Daniels v. Stock**, 21 Colo. App. 651, 126 P. 281 (1912) (qualified privilege abused where publication excessive and publication was partly for a purpose other than that of protecting interest on which privilege was based).

2. The statutory privilege of a radio or television broadcaster, *see* § 13-21-106, C.R.S., is now supplanted in most cases by the law governing the “public interest” First Amendment privilege. *See* Notes on Use and Source and Authority to Instruction 22:1.

3. For the statutory privilege — that is, immunity from any “civil liability” — an employer may have for providing information about a current or former employee to a prospective employer of that employee, *see* section 8-2-114, C.R.S. If the provisions of that section are applicable, this instruction, appropriately modified, may be used.

4. Section 16-3-203, C.R.S., provides that any person “who is made the defendant in any civil action as a result of having sought to prevent a crime being committed against any other person, and who has judgment entered in his favor, shall be entitled to all his court costs and to reasonable attorney fees incurred in such action.” The statute was applied in **Schwankl v. Davis**, 85 P.3d 512 (Colo. 2004) (to be entitled to recover under statute, successful defendant in defamation action need not prove elements of the crime, and reasonable attorney fees and costs may be recovered when trial court finds that defendant acted in good faith to report what she thought was a current or future crime).

## 22:19 AFFIRMATIVE DEFENSE—PRIVILEGE TO REPORT OFFICIAL OR PUBLIC MEETING PROCEEDINGS

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (libel) (slander), if the affirmative defense of a privilege to report (an official action) (or) (a[n official] [public] proceeding) is proved. This defense is proved if you find both of the following:

1. The defendant was reporting (*insert an appropriate description of the official action or proceeding, or meeting open to the public and dealing with a matter of public concern which defendant claims and which under the law would give rise to the privilege*); and

2. The report was substantially accurate and complete as to the matter being reported or it was a fair summary of the matter.

If this privilege has been proved, it does not matter that statements contained in the report may have been false and defamatory or that the defendant may have known or believed them to be false.

### Notes on Use

1. When otherwise applicable in light of the evidence in the case, this instruction applies whether the plaintiff is a public official, a public person, or a private person. It also applies to defendants who are private citizens, as well as communications media defendants and others. The privilege applies even if the publisher does not believe the statements to be true or the publisher knows them to be false.

2. If there is no dispute as to the facts covered by numbered paragraph 1, the paragraph should be omitted and an appropriate reference describing the report should be added in numbered paragraph 2. The report should also be referred to in an appropriate manner in the instruction setting forth the “statement of the case to be determined.” See Chapter 2.

### Source and Authority

1. This instruction is supported by *Tonnesson v. Denver Publish-*

**ing Co.**, 5 P.3d 959 (Colo. App. 2000), and RESTATEMENT (SECOND) OF TORTS § 611 (1977).

2. In **Wilson v. Meyer**, 126 P.3d 276 (Colo. App. 2005), the court of appeals expanded the fair report doctrine in Colorado to apply to reports concerning public proceedings generally, instead of only to reports of judicial proceedings. The holding extends the privilege to “media reports of defamatory statements made in other public proceedings.” *Id.* at 279–80 (applying RESTATEMENT § 611).

## 22:20 AFFIRMATIVE DEFENSE—PRIVILEGE TO PROVIDER OF MEANS OF COMMUNICATION

**No instruction prepared.**

### Note

1. One who provides a means of publication of defamatory matter published by another is privileged to do so if (a) the other is privileged to publish it, or (b) the person providing the means of publication reasonably believes that the other is privileged to publish it. A public utility under a duty to transmit messages is privileged to do so, even though it knows the message to be false and defamatory, unless (a) the sender of the message is not privileged to send it, and (b) the agent who transmits the message knows or has reason to know that the sender is not privileged to publish it. RESTATEMENT (SECOND) OF TORTS § 612 (1977).

2. Most of the issues that may be involved will be questions for the court. If there are fact issues, such as whether the communicator reasonably believed, or knew, or had reason to know, that the originator was privileged to publish the statements, an instruction similar to 22:19 should be given.

3. The Communications Decency Act of 1996 provides that no “provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1) (2018). An “information content provider” is one “responsible, in whole or in part, for the creation and development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3). The Joint Conference Committee Report indicates that this was intended to limit tort liability of online distributors of information, but the legislative history does not otherwise illuminate the scope of this provision. However, federal courts have interpreted this provision to eliminate all state law tort liability for internet speakers who do not originate the defamatory material. See 1 R. SACK, SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS § 7.3.2 (5th ed. 2018).

**22:21 AFFIRMATIVE DEFENSE—FAIR COMMENT**

**No instruction to be given.**

**Note**

The common-law defense of fair comment has been incorporated into the “statement of fact” requirement of the law of defamation. **Keohane v. Stewart**, 882 P.2d 1293 (Colo. 1994). Therefore, no instruction on this defense is to be given. See Introductory Note, ¶¶ 7-14.

**22:22 AFFIRMATIVE DEFENSE—CONSENT**

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (libel) (slander), if the affirmative defense of consent is proved. This defense is proved if you find both of the following:

1. The plaintiff by words or conduct, or both, expressly or impliedly (authorized) (or) (consented to) the publication of the statement(s) by the defendant; and

2. The publication by the defendant was done in the manner and for the purposes which the plaintiff consented to (or which the defendant, as a reasonable person, reasonably believed the plaintiff had consented to).

**Notes on Use**

1. Use whichever parenthesized words and phrases are appropriate in light of the evidence in the case.

2. Omit either numbered paragraph, the facts of which are not in dispute.

3. If there is any dispute as to whether the defendant published the statement, this instruction must be appropriately modified.

**Source and Authority**

1. This instruction is supported by **Dominguez v. Babcock**, 727 P.2d 362 (Colo. 1986); **Costa v. Smith**, 601 P.2d 661 (Colo. App. 1979) (a person's consent to publication of defamatory matter concerning that person is a complete defense). *See also* RESTATEMENT (SECOND) OF TORTS § 583 (1977).

2. A person who authorizes, requests, induces or otherwise consents to the publication of matter about him or herself takes the risk that it is or may be defamatory, and that person cannot recover damages for any resulting injuries or harm sustained. The terms of the consent control. Frequently the consent is conditioned upon a certain contingency or limited to a particular time or for a particular purpose. The defense of consent is lost where the publication goes beyond the scope of those conditions or limitations. RESTATEMENT (SECOND) OF TORTS § 583 cmts. c

and d (1977). Also, a person may consent to the publication of an original report which defames that person without necessarily consenting to any republication of it.

3. Consent may be express, either by oral or written authorization, or it may be implied from words or other conduct which, in light of the surrounding circumstances, may be reasonably interpreted as assent. A denial alone of, refusal to answer, or silence concerning a matter does not constitute consent. *See generally Dominguez*, 727 P.2d at 365 (“[c]onsent is a defense to an action for defamation only to the extent of that consent” (applying RESTATEMENT (SECOND) OF TORTS § 583 cmt. d, § 584 (1977))); RESTATEMENT (SECOND) OF TORTS § 583 cmt. c (1977).

## 22:23 AFFIRMATIVE DEFENSE—STATUTE OF LIMITATIONS

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on (his) (her) (its) claim of (libel) (slander), if the affirmative defense of the expiration of the statute of limitations is proved.

The affirmative defense of expiration of the statute of limitations is proved if you find that the plaintiff knew or with the exercise of reasonable diligence should have known before *(insert applicable date of exactly one year prior to commencement of action)* that (he) (she) (it) had (injuries) (damages) (losses) and that such (injuries) (damages) (losses) were caused in whole or in part by the publication of the statement(s) by the defendant.

If you find that the affirmative defense of expiration of the statute of limitations is proved, then your verdict must be for the defendant, *(name)*.

### Notes on Use

1. This instruction should be given only if the statute was pled as a defense and there is a disputed question of fact which would be proper to submit to the jury.

2. In computing when the statute of limitations begins to run, the date of the accruing event should be excluded. **Cade v. Regensberger**, 804 P.2d 238 (Colo. App. 1990). This instruction permits the jury to determine whether the accruing event happened before the last day on which the action could accrue and still be timely.

### Source and Authority

1. This instruction is supported by **Burke v. Greene**, 963 P.2d 1119 (Colo. App. 1998); and **Taylor v. Goldsmith**, 870 P.2d 1264 (Colo. App. 1994).

2. Each publication of a libel or slander is a separate claim for relief. **Spears Free Clinic & Hosp. v. Maier**, 128 Colo. 253, 261 P.2d 489 (1953); **Lininger v. Knight**, 123 Colo. 213, 226 P.2d 809 (1951); **Russell v. McMillen**, 685 P.2d 255 (Colo. App. 1984). Because each claim for relief accrues separately as to each publication, some claims may be barred and others not. **Corporon v. Safeway Stores, Inc.**, 708

P.2d 1385 (Colo. App. 1985). Also, as separate claims for relief, additional claims raised in an amended complaint which are based on other publications do not relate back to the commencement of the original action. C.R.C.P. 15(c); **Walker v. Associated Press**, 160 Colo. 361, 417 P.2d 486 (1966). *But see* **Dillingham v. Greeley Publ'g Co.**, 701 P.2d 27 (Colo. 1985) (relation back under C.R.C.P. 15(c) allowed on unique facts).

3. To prevent a multiplicity of lawsuits, it is generally recognized that a single newspaper issue or a single broadcast, although widely disseminated, constitutes only one publication and one claim for relief. RESTATEMENT (SECOND) OF TORTS § 577A (1977). The statute of limitations of one year, § 13-80-103(1)(a), C.R.S., begins to run on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. § 13-80-108(1), C.R.S.

## 22:24 REPETITION BY THIRD PERSONS AS AN ELEMENT OF DAMAGES

In awarding the plaintiff, (*name*), damages, if any, you must take into account not only the damages to the plaintiff which occurred as a result of the defendant's, (*name*), original publication of the defamatory statement(s), but also any damages which may have occurred as a result of any repetition of the defamatory statement(s) by third persons. However, you must also find that such repetition was the natural consequence of the defendant's original publication, or that the defendant expressly or impliedly authorized its repetition.

### Notes on Use

1. When appropriate, this instruction should be given in conjunction with Instruction 22:3.

2. If there is a dispute as to whether or not the defendant in fact published the words or caused them to be published, this instruction should be appropriately modified. Similarly, the same should be done if the action is a libel or slander per quod action, *see* Instructions 22:2 and 22:5, and there is a dispute as to whether the statement was defamatory.

3. This instruction should be given when the plaintiff has claimed and there is sufficient evidence supporting such claim that the statement was repeated by third persons as a result of the defendant's original publication. This is not the same as a republication of the statement by, or caused by, a further voluntary act of the defendant. Such a republication is a separate claim which should be set out as a separate claim for relief in the complaint, be separately proved by the evidence, and be subject to the same requirements and defenses as any other separate defamation claim. *See Spears Free Clinic & Hosp. v. Maier*, 128 Colo. 263, 261 P.2d 489 (1953).

### Source and Authority

This instruction is supported by *Taylor v. Goldsmith*, 870 P.2d 1264 (Colo. App. 1994).

**22:25 DAMAGES—RECOVERY OF**

Plaintiff, *(name)*, has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the publication of the statement(s) by the defendant(s), *(name[s])*, (and the *[insert appropriate description, e.g., "negligence"]*, if any, of any designated nonparties).

In determining these damages, you shall consider the following:

1. Any noneconomic losses or injuries plaintiff has had to the present time or which plaintiff will probably have in the future, including: damage to the plaintiff's reputation, physical and mental pain and suffering, inconvenience, emotional stress, fear, anxiety, embarrassment, humiliation, impairment of quality of life, and *[insert any other recoverable noneconomic losses for which there is sufficient evidence]*.

2. Any economic losses plaintiff has had to the present time or will probably have in the future, including: loss of earnings or income; ability to earn money in the future; (reasonable and necessary) medical, hospital and other expenses, loss of or injury to (his) (her) credit standing, and *[insert any other recoverable economic losses for which there is sufficient evidence]*.

(If you find in favor of the plaintiff, but do not find any actual damages, you shall award [him] [her] nominal damages of one dollar.)

**Notes on Use**

1. The damage instruction should not state the amount of damages sought. **Rodrigue v. Hausman**, 33 Colo. App. 305, 519 P.2d 1216 (1974).

2. In cases involving per se defamations of private persons, though

involving a matter of public interest or general concern (Instruction 22:1, especially Note 9 of the Notes on Use to that instruction), the last unnumbered parenthesized paragraph relating to nominal damages should be given. In all other cases, that is, cases in which the plaintiff must prove actual or special damages as an element of his or her claim (Instructions 22:1, 22:2 and 22:5), this last parenthesized paragraph should be omitted.

3. In **Tonnesson v. Denver Publishing Co.**, 5 P.3d 959 (Colo. App. 2000), the court held that when harmful but unchallenged or nonactionable statements accompany actionable statements, the plaintiff must establish that the damages in issue were due to “incremental harm” caused by the actionable statements. When the existence of such “incremental” damages presents a jury question, the court should instruct that the plaintiff must prove that any damages were caused by the actionable statements as distinct from those unchallenged or found to be nonactionable.

4. As to the second numbered paragraph, omit any enumerated element of damages of which there is not sufficient evidence, and as to the compensable damages a plaintiff may be entitled to recover, see RESTATEMENT (SECOND) OF TORTS §§ 621–623 (1977); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 116A, at 842–45 (5th ed. 1984).

5. The court determines what items of harm suffered by the plaintiff as a result of the publication may be considered by the jury in assessing damages. RESTATEMENT (SECOND) OF TORTS § 616 (1977).

### Source and Authority

1. This instruction is supported by **Keohane v. Stewart**, 882 P.2d 1293 (Colo. 1994). See also Source and Authority to Instruction 22:14.

2. In addition, as to the noneconomic damages set out in numbered paragraph 1, such damages include injury to reputation and to the feelings of the plaintiff, which are “presumed” and need not be established by evidence. See **Kendall v. Lively**, 94 Colo. 483, 31 P.2d 343 (1934); **Republican Publ’g Co. v. Conroy**, 5 Colo. App. 262, 38 P. 423 (1894); see also **Republican Publ’g Co. v. Mosman**, 15 Colo. 399, 24 P. 1051 (1890) (injury to feelings are includable in the plaintiff’s general damages); PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 116A, at 844–45; 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 5.30 (3d ed. 2006). The jury is entitled to consider any evidence of actual injury to reputation and to the feelings of the plaintiff and evidence tending to show mitigation of such injuries. **Williams v. Dist. Court**, 866 P.2d 908 (Colo. 1993).

## 22:26 CIRCUMSTANCES THAT MITIGATE DAMAGES

If you find that the plaintiff, (*name*), is entitled to recover damages from the defendant, (*name*), then in determining those damages you must take into account any of the following factors that have been proved by a preponderance of the evidence. You should consider these factors only to the extent that they justify a reduction in the amount of damages to be awarded.

(1. Whether the defendant reasonably relied on the source of information on which the [statement was] [statements were] based;)

(2. Whether the plaintiff's damages were caused, in part, by third persons who published on the same subject, before or about the same time as the defendant published;)

(3. Whether the defendant did not intend to injure the plaintiff's reputation, good name or feelings;)

(4. Whether the defendant acted in good faith, believing the statement[s] to be true;)(or)

(5. Whether the defendant [clarified,] [corrected,] [apologized for,] [or] [retracted] the statement[s] with reasonable promptness and fairness.)

### Notes on Use

1. Omit any numbered paragraphs if the matters have not been properly pleaded or there is insufficient evidence from which the jury might reasonably find the facts to be true. Numbered paragraphs 1, 2, and 4 are inapplicable when knowledge of falsity or reckless disregard is an element of liability, as in Instructions 22:1 and 22:2.

2. Add any other matters that may be proved as a mitigating circumstance.

3. When appropriate, this instruction should be given in conjunction with Instruction 22:25.

4. The burdens of pleading and proving mitigation are on the defendant. C.R.C.P. 8(c); § 13-25-125, C.R.S. (whether the defendant successfully proves the defense of truth, the defendant is entitled to give evidence in mitigation); **Gomba v. McLaughlin**, 180 Colo. 232, 504 P.2d 337 (1972).

5. The jury may consider a retraction when calculating damages. The jury should consider whether the retraction was full and complete, the timing and placement of the retraction, whether defendants admitted a mistake, whether defendants apologized, the audience the retraction reached, and the effect the retraction had on lessening the harm to the plaintiff. **Lee v. Colo. Times, Inc.**, 222 P.3d 957 (Colo. App. 2009) (discussing circumstances of retractions as mitigating factors in out-of-state defamation cases, and holding that the same circumstances may be considered in outrageous conduct case).

### Source and Authority

This instruction is supported by **Walker v. Colorado Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975) (paragraph 5), *overruled on other grounds by* **Diversified Mgmt., Inc. v. Denver Post, Inc.**, 653 P.2d 1103 (Colo. 1982); **Wertz v. Lawrence**, 66 Colo. 55, 179 P. 813 (1919) (paragraph 4); **Rocky Mountain News Printing Co. v. Fridborn**, 46 Colo. 440, 104 P. 956 (1909) (paragraphs 2, 4, and, by implication, 3); **Republican Publishing Co. v. Mosman**, 15 Colo. 399, 24 P. 1051 (1890) (paragraphs 2 and 4); and **Republican Publishing Co. v. Miner**, 20 P. 345 (Colo. 1888) (paragraph 5; also proof that plaintiff already had a bad reputation). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 116A, at 845-48 (5th ed. 1984).

## 22:27 EXEMPLARY OR PUNITIVE DAMAGES

### Use Instruction 5:4.

#### Notes on Use

When otherwise applicable to the evidence in the case, Instruction 5:4 should be used for instructing on punitive damages.

#### Source and Authority

1. Punitive damages focus on the defendant's attitude toward the plaintiff, and not necessarily on the truth or falsity of the material published. **Cantrell v. Forest City Publ'g Co.**, 419 U.S. 245 (1974). Therefore, it does not always follow, as stated in **Curtis Publishing Co. v. Butts**, 388 U.S. 130, 161 (1967), that "misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive award." *See also Walker v. Colo. Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450 (1975), *overruled on other grounds by Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982).

2. In cases involving private persons involved in a matter of public interest or general concern, "[s]tates may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." **Gertz v. Robert Welch, Inc.**, 418 U.S. 323, 349 (1974). For such cases, however, Colorado, in **Walker**, 188 Colo. at 98–99, 538 P.2d at 457, and **Diversified Management, Inc.**, 653 P.2d at 1106, adopted the knowledge or reckless disregard standard for liability.

3. "Actual malice," as defined in **New York Times Co. v. Sullivan**, 376 U.S. 254, 280 (1964), and its progeny, means "with knowledge that [a defamatory statement] was false or with reckless disregard of whether it was false or not." As so defined, "actual malice" is a "term of art, created to provide a convenient shorthand expression for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers. As such, it is quite different from the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages." **Cantrell**, 419 U.S. at 251–252.

4. In cases involving defamations of private persons about private matters, the usual rules relating to presumed damages and punitive damages are applicable. **Rowe v. Metz**, 195 Colo. 424, 579 P.2d 83 (1978). The usual punitive damage rules also apply to a public official, public figure, or private person involved in a matter of public concern once such a plaintiff has established a valid claim under Instruction 22:1 or 22:2.

5. Except as otherwise provided in section 24-10-118(5), C.R.S., pu-

nitive damages are not recoverable against a public entity. § 24-10-114(4), C.R.S.; **Martin v. Weld Cty.**, 43 Colo. App. 49, 598 P.2d 532 (1979).

## **CHAPTER 23. EXTREME AND OUTRAGEOUS CONDUCT— EMOTIONAL DISTRESS**

- 23:1 Elements of Liability
- 23:2 Extreme and Outrageous Conduct—Defined
- 23:3 Recklessly or with Intent—Defined
- 23:4 Severe Emotional Distress—Defined
- 23:5 Exercising Legal Rights in Permissible Manner
- 23:6 Actual Damages

### **23:1 ELEMENTS OF LIABILITY**

**For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of extreme and outrageous conduct, you must find all of the following have been proved by a preponderance of the evidence:**

- 1. The defendant engaged in extreme and outrageous conduct;**
- 2. The defendant did so recklessly or with the intent of causing the plaintiff severe emotional distress; and**
- 3. The defendant's conduct caused the plaintiff severe emotional distress.**

**If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.**

**On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).**

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. Omit any numbered paragraph, the facts of which are not in dispute.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. If the defendant has put no affirmative defense in issue or there is insufficient evidence to support a defense, the two last paragraphs should be omitted.

4. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

5. Other appropriate instructions defining the terms used in this instruction must also be given with this instruction, in particular an instruction or instructions relating to causation. *See* Instructions 9:18–9:21.

6. This instruction does not apply when the conduct was not directed toward the plaintiff and the plaintiff was not present. **Bradshaw v. Nicolay**, 765 P.2d 630 (Colo. App. 1988).

#### Source and Authority

1. This instruction is supported by **Rugg v. McCarty**, 173 Colo. 170, 476 P.2d 753 (1970), which recognized the tort of intentional infliction of emotional distress as set out in RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). The court specifically noted that proof of accompanying physical injury is not required. Proof of severe emotional distress, however, is required. **Espinosa v. Sheridan United Tire**, 655 P.2d

424 (Colo. App. 1982); *see also* **Coors Brewing Co. v. Floyd**, 978 P.2d 663 (Colo. 1999); **Culpepper v. Pearl Street Bldg., Inc.**, 877 P.2d 877 (Colo. 1994); **Reigel v. SavaSeniorCare L.L.C.**, 292 P.3d 977 (Colo. App. 2011); **Green v. Qwest Servs. Corp.**, 155 P.3d 383 (Colo. App. 2006); **Archer v. Farmer Bros. Co.**, 70 P.3d 495 (Colo. App. 2002), *aff'd on other grounds*, 90 P.3d 228 (Colo. 2004); **English v. Griffith**, 99 P.3d 90 (Colo. App. 2004); **Pearson v. Kancilia**, 70 P.3d 594 (Colo. App. 2003); **McCarty v. Kaiser-Hill Co., L.L.C.**, 15 P.3d 1122 (Colo. App. 2000); **Tracz v. Charter Centennial Peaks Behavioral Health Sys., Inc.**, 9 P.3d 1168 (Colo. App. 2000); **Tonnessen v. Denver Publ'g Co.**, 5 P.3d 959 (Colo. App. 2000); **Roget v. Grand Pontiac, Inc.**, 5 P.3d 341 (Colo. App. 1999); **Bohrer v. DeHart**, 943 P.2d 1220 (Colo. App. 1996); **Card v. Blakeslee**, 937 P.2d 846 (Colo. App. 1996) (alleged conduct not extreme and outrageous); **Spencer v. United Mortg. Co.**, 857 P.2d 1342 (Colo. App. 1993); **Corcoran v. Sanner**, 854 P.2d 1376 (Colo. App. 1993); **Ellis v. Buckley**, 790 P.2d 875 (Colo. App. 1989); **Montgomery Ward & Co. v. Andrews**, 736 P.2d 40 (Colo. App. 1987); **Hansen v. Hansen**, 43 Colo. App. 525, 608 P.2d 364 (1979).

2. For a historical discussion, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12 (5th ed. 1984).

3. Whether the alleged outrageous conduct was sufficiently heinous to create a submissible claim is a threshold matter of law for the court to determine. **Coors Brewing Co.**, 978 P.2d at 665–66; **Reigel**, 292 P.3d at 991; **Lee v. Colo. Times, Inc.**, 222 P.3d 957 (Colo. App. 2009); **Green**, 155 P.3d at 385; **Bob Blake Builders, Inc. v. Gramling**, 18 P.3d 859 (Colo. App. 2001); **McCarty**, 15 P.3d at 1126; **Tracz**, 9 P.3d at 1175; **Tonnessen**, 5 P.3d at 967; **Roget**, 5 P.3d at 345; **Hewitt v. Pitkin Cty. Bank & Tr. Co.**, 931 P.2d 456 (Colo. App. 1995); **Hutton v. Mem'l Hosp.**, 824 P.2d 61 (Colo. App. 1991); **Bauer v. Sw. Denver Mental Health Ctr., Inc.**, 701 P.2d 114 (Colo. App. 1985).

4. Except in the form of punitive damages, and then only as authorized under section 24-10-118(5), C.R.S., “[a] public entity shall not be liable either directly or by indemnification . . . for damages for outrageous conduct.” § 24-10-114(4), C.R.S.; *see, e.g.*, **Hutton**, 824 P.2d at 65.

5. “[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications [made to third persons] without showing [as in defamation cases] that the publication contains a false statement of fact which was made . . . with knowledge that the statement was false or with reckless disregard as to whether or not it was true.” **Hustler Magazine v. Falwell**, 485 U.S. 46, 56 (1988); *see also* **Pierce v. St. Vrain Valley Sch. Dist.**, 944 P.2d 646 (Colo. App. 1997), *rev'd on other grounds*, 981 P.2d 600 (Colo. 1999); **Brooks v. Paige**, 773 P.2d 1098 (Colo. App. 1988). In such cases, this instruction must be appropriately modified to include these additional elements of liability. By way of illustration, see Instructions 22:1 and 22:3.

6. A spouse may maintain an action against the other spouse for

intentional infliction of emotional distress committed during the marriage. **Simmons v. Simmons**, 773 P.2d 602 (Colo. App. 1988).

7. “The [Workers’] Compensation Act constitutes the exclusive remedy available to an employee for a co-employee’s commission of intentional infliction of emotional distress during the scope of employment.” **Hoffsetz v. Jefferson Cty. Sch. Dist. No. R-1**, 757 P.2d 155, 159 (Colo. App. 1988). However, the exclusive remedy provision of the Workers’ Compensation Act does not preempt an employee’s action against his or her employer and its agents for outrageous conduct in terminating the employment when the injury was not inflicted in the course of the employment. **Archer**, 70 P.3d at 498–99.

8. An insurer may be liable for both outrageous conduct and a bad faith breach of insurance contract as a result of its mishandling of a worker’s compensation claim. **McKelvy v. Liberty Mut. Ins. Co.**, 983 P.2d 42 (Colo. App. 1998). However, a claim for outrageous conduct must be based upon conduct that is more egregious than either the conduct underlying a bad faith claim or a willful and wanton breach of contract claim under the former No-Fault Act. **Munoz v. State Farm Mut. Auto. Ins. Co.**, 968 P.2d 126 (Colo. App. 1998).

9. For the tort of interfering with the parent-child relationship by abducting or inducing a minor child to leave a parent entitled to legal custody, see **D & D Fuller CATV Constr., Inc. v. Pace**, 780 P.2d 520 (Colo. 1989), specifically applying the tort as set out in RESTATEMENT (SECOND) OF TORTS § 770 (1977). See also § 13-21-106.5, C.R.S. (authorizing civil damages for bias-motivated crime (formerly ethnic intimidation), including recovery of punitive damages).

10. In **Vikman v. International Brotherhood of Electrical Workers**, 889 P.2d 646 (Colo. 1995), the court held that the National Labor Relations Act, 29 U.S.C. §§ 151 to -169, did not preempt outrageous conduct claims against a union arising out of a union activity against union member who crossed a picket line.

11. The tort of outrageous conduct may be premised on conduct that also constitutes a battery. **Winkler v. Rocky Mtn. Conference of United Methodist Church**, 923 P.2d 152 (Colo. App. 1995).

12. The firing of an employee because of a disability, in violation of the Colorado Anti-Discrimination Act, § 24-34-402, C.R.S., is not sufficient, in and of itself, to support a claim of outrageous conduct. **Bigby v. Big 3 Supply Co.**, 937 P.2d 794 (Colo. App. 1996).

13. An outrageous conduct claim may not be stated against an employer providing alcohol as a social host to adults, in light of the protection offered by section 12-47-801(4)(a), C.R.S. **Rojas v. Engineered Plastic Designs, Inc.**, 68 P.3d 591 (Colo. App. 2003).

14. A claim for outrageous conduct may be based on unwanted and

egregious sexual harassment in the workplace. **Pearson**, 70 P.3d at 597–98.

15. The First Amendment may bar an outrageous conduct claim under some circumstances. See **Seefried v. Hummel**, 148 P.3d 184 (Colo. App. 2005) (First Amendment's Free Exercise Clause prohibited court from hearing outrageous conduct claims brought by former senior pastor of church, former associate pastor, and limited liability company (LLC) owned by associate pastor, against church, members of church's board of directors, individually and as directors, and three church members formerly employed by LLC).

16. Although not a holding, the court in **Moore v. Western Forge Corp.**, 192 P.3d 427 (Colo. App. 2007), noted that other jurisdictions allow a wrongful-death claimant to recover for a decedent's suicide when the claimant can prove that the defendant's outrageous conduct caused the suicide.

17. A trial court's refusal to grant a motion for directed verdict in favor of an injured party on his or her claim for outrageous conduct does not bar or preclude a later jury verdict against the tortfeasor. **Palmer v. Diaz**, 214 P.3d 546 (Colo. App. 2009).

18. In the context of a publication that is found to constitute outrageous conduct, the jury may consider a retraction when calculating damages. The jury should consider whether the retraction was full and complete, the timing and placement of the retraction, whether defendants admitted a mistake, whether defendants apologized, the audience the retraction reached, and the effect the retraction had on lessening the harm to the plaintiff. **Lee**, 222 P.3d at 965–66.

19. A casino patron's claim against a casino and slot machine manufacturer for extreme and outrageous conduct fell within the Colorado Limited Gaming Control Commission's exclusive regulatory authority and, thus, such claim was properly dismissed by the court. **Barry v. Bally Gaming, Inc.**, 2013 COA 176, ¶ 27, 320 P.3d 387.

## 23:2 EXTREME AND OUTRAGEOUS CONDUCT— DEFINED

Extreme and outrageous conduct is conduct that is so outrageous in character, and so extreme in degree, that a reasonable member of the community would regard the conduct as atrocious, going beyond all possible bounds of decency and utterly intolerable in a civilized community. Such outrageous conduct occurs when knowledge of all the facts by a reasonable member of the community would arouse that person's resentment against the defendant, and lead that person to conclude that the conduct was extreme and outrageous.

(A series of acts may constitute outrageous conduct, even though any one of the acts might be considered only an isolated unkindness or insult.) (A simple act of unkindness or insult, standing alone, does not constitute outrageous conduct. However, a single incident may constitute outrageous conduct if the incident would be so regarded by a reasonable member of the community.)

(The extreme and outrageous character of conduct may arise from a person's knowledge that another is peculiarly susceptible to emotional distress because of some physical or mental condition or peculiarity. The same conduct without that knowledge might not be extreme and outrageous. However, the fact that a person knows that another person will consider the conduct to be insulting or will have his or her feelings hurt does not, by itself, make the conduct extreme and outrageous.)

### Notes on Use

1. Only so much of the parenthesized portions should be given, with such modifications as are necessary, as is consistent with the evidence in the case.

2. When the third paragraph of this instruction is given, the second paragraph in Instruction 23:4 should also be given.

3. When Instruction 23:1 is given, this instruction must also be given if the issue of extreme and outrageous conduct is in dispute.

4. Under section 24-10-118(2)(a), C.R.S., of the Colorado Governmental Immunity Act, public employees, such as a supervisor, are entitled to immunity for claims of outrageous conduct unless their conduct is willful and wanton. In such circumstances, a fourth element—that the conduct was willful and wanton—should be included in the instruction. **Smith v. Bd. of Educ.**, 83 P.3d 1157 (Colo. App. 2003).

### Source and Authority

1. This instruction is supported by **Rugg v. McCarty**, 173 Colo. 170, 476 P.2d 753 (1970) (approving the definition from the RESTATEMENT (SECOND) OF TORTS § 46 (1965)). *See also* **Coors Brewing Co. v. Floyd**, 978 P.2d 663 (Colo. 1999) (allegations of extreme and outrageous conduct insufficient); **Culpepper v. Pearl Street Bldg., Inc.**, 877 P.2d 877 (Colo. 1994); **Destefano v. Grabrian**, 763 P.2d 275 (Colo. 1988) (allegation of extreme and outrageous conduct sufficient); **Churchey v. Adolph Coors Co.**, 759 P.2d 1336 (Colo. 1988) (allegation of extreme and outrageous conduct insufficient); **Reigel v. SavaSeniorCare, L.L.C.**, 292 P.3d 977 (Colo. App. 2011) (conduct not extreme and outrageous); **English v. Griffith**, 99 P.3d 90 (Colo. App. 2004) (conduct not extreme and outrageous); **Gordon v. Boyles**, 99 P.3d 75 (Colo. App. 2004) (conduct not extreme and outrageous); **Tracz v. Charter Centennial Peaks Behavioral Health Sys., Inc.**, 9 P.3d 1168 (Colo. App. 2000); **Tonnessen v. Denver Publ'g Co.**, 5 P.3d 959 (Colo. App. 2000); **Roget v. Grand Pontiac, Inc.**, 5 P.3d 341 (Colo. App. 1999); **Munoz v. State Farm Mut. Auto. Ins. Co.**, 968 P.2d 126 (Colo. App. 1998); **Bohrer v. DeHart**, 943 P.2d 1220 (Colo. App. 1996); **Zick v. Krob**, 872 P.2d 1290 (Colo. App. 1993) (conduct not extreme and outrageous); **Ellis v. Buckley**, 790 P.2d 875 (Colo. App. 1989) (evidence of extreme and outrageous conduct sufficient); **Lindemuth v. Jefferson Cty. Sch. Dist. R-1**, 765 P.2d 1057 (Colo. App. 1988) (conduct not extreme and outrageous); **Rubenstein v. S. Denver Nat'l Bank**, 762 P.2d 755 (Colo. App. 1988) (conduct not extreme and outrageous); **Montoya v. Bebensee**, 761 P.2d 285 (Colo. App. 1988) (allegation of extreme and outrageous conduct sufficient); **Bauer v. Sw. Denver Mental Health Ctr., Inc.**, 701 P.2d 114 (Colo. App. 1985) (insufficient allegations of extreme and outrageous conduct); **Moore v. Georgeson**, 679 P.2d 1099 (Colo. App. 1983) (evidence of extreme and outrageous conduct insufficient); **Danyew v. Phelps**, 676 P.2d 707 (Colo. App. 1983) (evidence of extreme and outrageous conduct sufficient); **Widdifield v. Robertshaw Controls Co.**, 671 P.2d 989 (Colo. App. 1983) (evidence of extreme and outrageous conduct insufficient); **Hansen v. Hansen**, 43 Colo. App. 525, 608 P.2d 364 (1979) (conduct not extreme and outrageous); **Deming v. Kellogg**, 41 Colo. App. 264, 583 P.2d 944 (1978) (insufficient allegations of extreme and outrageous conduct); **Meiter v. Cavanaugh**, 40 Colo. App. 454, 580 P.2d 399; **DeCicco v. Trinidad Area Health Ass'n**, 40 Colo. App. 63, 573 P.2d 559 (1977); **Enright v. Groves**, 39 Colo. App. 39, 560 P.2d 851 (1977); **Blackwell v. Del Bosco**, 35 Colo. App. 399, 536 P.2d 838 (1975) (conduct not extreme and outrageous), *aff'd on other grounds*, 191 Colo. 344, 558 P.2d 563 (1976).

2. “The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.” RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965); *see also* **Roget**, 5 P.3d at 345; **Gorab v. Equity Gen. Agents, Inc.**, 661 P.2d 1196 (Colo. App. 1983); **Farmers Grp., Inc. v. Trimble**, 658 P.2d 1370 (Colo. App. 1982), *aff’d on other grounds*, 691 P.2d 1138 (Colo. 1984); **Zalnis v. Thoroughbred Datsun Car Co.**, 645 P.2d 292 (Colo. App. 1982). If there is evidence in the case of these circumstances, this instruction should be appropriately modified, setting forth the rules in a manner similar to that in the parenthesized third paragraph. However, liability for outrageous conduct does not extend to “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” **Bob Blake Builders, Inc. v. Gramling**, 18 P.3d 859, 866 (Colo. App. 2001); *accord* **Pearson v. Kancilia**, 70 P.3d 594 (Colo. App. 2003); **Archer v. Farmer Bros. Co.**, 70 P.3d 495 (Colo. App. 2002), *aff’d on other grounds*, 90 P.3d 228 (Colo. 2004).

3. A series of incidents or a course of conduct will more frequently give rise to outrageous conduct than a single incident. *See* **Lee v. Colo. Times, Inc.**, 222 P.3d 957 (Colo. App. 2009). However, a single incident will give rise to outrageous conduct if that incident involves conduct that meets the definition of outrage as expressed in this instruction. *See* **DeCicco**, 40 Colo. App. at 66, 573 P.2d at 562 (refusal of ambulance service to critically ill plaintiff could meet test for outrageous conduct).

4. Whether the defendant’s behavior is viewed as a course of conduct or as a single incident, “it is the totality of conduct that must be evaluated to determine whether outrageous conduct has occurred.” **Zalnis**, 645 P.2d at 294; *see also* **Vogel v. Carolina Int’l, Inc.**, 711 P.2d 708 (Colo. App. 1985) (discussing, but not deciding, whether a single act or event is sufficient to constitute extreme and outrageous conduct).

5. The Colorado Court of Appeals has recognized a claim for outrageous conduct based on an unwanted and egregious sexual harassment in the workplace. **Pearson**, 70 P.3d at 597–98.

**23:3 RECKLESSLY OR WITH INTENT—DEFINED**

A person intends to cause another severe emotional distress if that person engages in conduct for the purpose, in whole or in part, of causing severe emotional distress in another person, or knowing that his or her conduct is certain or substantially certain to have that result.

A person whose conduct causes severe emotional distress in another person has acted recklessly if, at the time, that person knew, or, because of other facts known to him or her, reasonably should have known that there was a substantial probability that his or her conduct would cause severe emotional distress in another person.

**Notes on Use**

1. When Instruction 23:1 is given, this instruction must also be given if the issue of intent is in dispute.
2. If there is no evidence to support one of the paragraphs, that paragraph should not be given.

**Source and Authority**

1. This instruction is supported by **Culpepper v. Pearl Street Building, Inc.**, 877 P.2d 877 (Colo. 1994); and **Zalnis v. Thoroughbred Datsun Car Co.**, 645 P.2d 292 (Colo. App. 1982) (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

2. This instruction was cited with approval in **Culpepper**, 877 P.2d at 882–83.

## 23:4 SEVERE EMOTIONAL DISTRESS—DEFINED

Severe emotional distress consists of highly unpleasant mental reactions, such as (nervous shock, fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry) and is so extreme that no person of ordinary sensibilities could be expected to tolerate and endure it. The duration and intensity of emotional distress are factors to be considered in determining its severity.

(If a person is more susceptible to a certain kind of emotional distress than a person of ordinary sensibilities and that fact is known to another person who recklessly or intentionally causes that emotional distress, then the emotional distress is severe if it is more than a person of the same or similar susceptibility would reasonably be expected to endure under the same or similar circumstances.)

### Notes on Use

1. This instruction is to be given whenever Instruction 23:1 is given.
2. In the first paragraph, use only those descriptive words in the parentheses that are appropriate to the evidence in the case.
3. Omit the second parenthesized paragraph, unless there is evidence that would support the jury finding that the plaintiff was peculiarly susceptible and the defendant had knowledge of that fact.
4. When the third paragraph of Instruction 23:2 is given the second paragraph of this instruction should be given as well.

### Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965). *See also* **Espinosa v. Sheridan United Tire**, 655 P.2d 424 (Colo. App. 1982) (suggesting that RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965) is part of Colorado's common law); **DeCicco v. Trinidad Area Health Ass'n**, 40 Colo. App. 63, 573 P.2d 559 (1977) (grief is significant factor in outrageous conduct action).
2. The second paragraph is supported by **Zalnis v. Thoroughbred Datsun Car Co.**, 645 P.2d 292 (Colo. App. 1982).
3. Severe emotional distress does not require an accompanying

physical injury. **Rugg v. McCarty**, 173 Colo. 170, 476 P.2d 753 (1970).

## 23:5 EXERCISING LEGAL RIGHTS IN PERMISSIBLE MANNER

The defendant, (name), claims that (he) (she) (it) was exercising (his) (her) (its) legal rights in (insert appropriate description, e.g., evicting the plaintiff, arresting the plaintiff, attempting collection of a debt, etc.). If the defendant was exercising (his) (her) (its) legal rights in a manner that would not otherwise constitute extreme and outrageous conduct, your verdict must be for the defendant.

### Notes on Use

1. Comment g to the RESTATEMENT (SECOND) OF TORTS § 46 (1965) states in part: "The actor is never liable . . . where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." A "permissible way," however, is one that does not give rise to the tort of intentional infliction of emotional distress by extreme and outrageous conduct. The purpose of this instruction, therefore, is to make it clear to the jury, when necessary, that (1) the fact that the defendant was exercising a legal right does not excuse the defendant's conduct if it was otherwise tortious, but (2) when the defendant was exercising a legal right, the burden of proof remains on the plaintiff to prove the defendant's conduct was "extreme and outrageous."

2. Because this burden remains on the plaintiff, the rule stated in this instruction does not set out an affirmative defense; rather, it is a cautionary instruction to explain to the jury what relevance they should give, if any, to the fact that the defendant was "exercising a legal right."

3. The instruction, therefore, should only be given when there is evidence that the defendant was in fact exercising legal rights. If it is uncontroverted that the defendant's conduct also violated some provision of the law, criminal or civil, or constituted a breach of contract, violation of a lease, etc., the instruction should not be used.

### Source and Authority

This instruction is supported by the RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965). See also *Montgomery Ward & Co. v. Andrews*, 736 P.2d 40 (Colo. App. 1987) (recognizing and citing rule set out in instruction but holding it inapplicable because condition set out in second sentence of instruction not met).

## 23:6 ACTUAL DAMAGES

Plaintiff, (*name*), has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the extreme and outrageous conduct of the defendant(s), (*name[s]*), (and the [*insert appropriate description, e.g., "negligence"*], if any, of any designated nonparties).

In determining these damages, you shall consider the following:

1. Any noneconomic losses or injuries plaintiff has had to the present time or that plaintiff will probably have in the future, including: physical and mental pain and suffering, inconvenience, emotional stress, fear, anxiety, embarrassment, humiliation, public disgrace, indignity, impairment of the quality of life, and (*insert any other recoverable noneconomic losses for which there is sufficient evidence*). (In considering damages in this category, you shall not consider damages for [physical impairment] [or] [disfigurement], because these damages, if any, are to be considered in a separate category.)

2. Any economic losses plaintiff has had to the present time or will probably have in the future, including: loss of earnings or income; ability to earn money in the future; (reasonable and necessary) medical, hospital and other expenses, and (*insert any other recoverable economic losses for which there is sufficient evidence*). (In considering damages in this category, you shall not consider damages for [physical impairment] [or] [disfigurement], since these damages, if any, are to be considered in a separate category.)

(3. Any [physical impairment] [or] [disfigurement]. In considering damages in this category, you shall not include damages again for losses

or injuries already determined in either numbered paragraph 1 or 2 above.)

### Notes on Use

1. Only those numbered, parenthesized words or phrases as are appropriate in the case should be given.

2. The amount of damages sought should not be stated in this instruction or in the statement of the case. **Rodrigue v. Hausman**, 33 Colo. App. 305, 519 P.2d 1216 (1974).

3. Where appropriate, “fault” of nonparties must be considered. See **Slack v. Farmers Ins. Exch.**, 5 P.3d 280 (Colo. 2000) (section 13-15-111.5, C.R.S., requires the pro rata distribution of civil liability among intentional and negligent tortfeasors who jointly cause indivisible injuries).

### Source and Authority

1. This instruction is supported by **Palmer v. Diaz**, 214 P.3d 546 (Colo. App. 2009); and **Meiter v. Cavanaugh**, 40 Colo. App. 454, 580 P.2d 399 (1978).

2. The sentimental and emotional value of property may be considered in awarding damages in claims for the intentional or reckless infliction of emotional distress, such as a claim for outrageous conduct. **Chryar v. Wolf**, 21 P.3d 428 (Colo. App. 2000).

3. In the context of a publication that is found to constitute outrageous conduct, the jury may consider a retraction when calculating damages. The jury should consider whether the retraction was full and complete, the timing and placement of the retraction, whether defendants admitted a mistake, whether defendants apologized, the audience the retraction reached, and the effect the retraction had on lessening the harm to the plaintiff. **Lee v. Colo. Times, Inc.**, 222 P.3d 957 (Colo. App. 2009).

## CHAPTER 24. INTENTIONAL INTERFERENCE WITH CONTRACTUAL OBLIGATIONS

### 24:1 ELEMENTS OF LIABILITY

24:2 Intentional Conduct—Defined

24:3 Improper—Defined

24:4 Interference—Defined

24:5 Contracts Terminable at Will or Voidable

24:6 Affirmative Defense—Privilege—When Existent—When  
LOST

24:7 Actual or Nominal Damages

### 24:1 ELEMENTS OF LIABILITY

**For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of intentional interference with contract, you must find that all of the following have been proved by a preponderance of the evidence:**

**1. The plaintiff had a contract with (*name of third person*) in which (*name of third person*) agreed to (*describe the substance of the promise the defendant allegedly interfered with*);**

**2. The defendant knew or reasonably should have known of the contract;**

**3. The defendant by words or conduct, or both, intentionally (caused [*name of third person*] [not to perform] [to terminate] [his] [her] contract with the plaintiff) (or) (interfered with [*name of third person*]'s performance of the contract, thereby causing [*name of third person*] [not to perform] [to terminate] the contract with the plaintiff);**

**4. The defendant's interference with the contract was improper; and**

**5. The defendant's interference with the contract caused the plaintiff (damages) (losses).**

If you find any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to the plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

(In determining whether the affirmative defense of privilege [*describe privilege*] has been proved, you must also determine whether the plaintiff proved by a preponderance of the evidence that the defendant abused that privilege as explained in Instruction No. [*insert instruction number that corresponds to 24:6*].)

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

**Notes on Use**

1. Use whichever parenthesized or bracketed portions are appropriate.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form).

3. Omit any numbered paragraph, the facts of which are not disputed.

4. Other appropriate instructions defining the terms used in this

instruction, for example, “contract,” “intentional conduct” (Instruction 24:2), “improper” (Instruction 24:3), must also be given with this instruction, in particular an appropriate instruction or instructions relating to causation (Instructions 9:18-9:21). An instruction relating to constructive notice of the contract may also be used in connection with paragraph 2 of the instruction. *See* Instruction 3:7.

5. Where there is evidence that the third person has partially performed, the phrase in numbered paragraph 3, “not to perform,” if used, should be changed to read “not to perform fully.”

6. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

### Source and Authority

1. This instruction is supported by **Warne v. Hall**, 2016 CO 50, ¶ 25, 373 P.3d 588 (referencing with approval the RESTATEMENT (SECOND) OF TORTS § 767 (1965)); **Radiology Professional Corp. v. Trinidad Area Health Ass’n**, 195 Colo. 253, 577 P.2d 748 (1978) (no liability where third party did not in fact breach the contract); **Watson v. Settlemeyer**, 150 Colo. 326, 372 P.2d 453 (1962); **Credit Investment & Loan Co. v. Guaranty Bank & Trust Co.**, 143 Colo. 393, 353 P.2d 1098 (1960); **Comtrol, Inc. v. Mountain States Telephone & Telegraph Co.**, 32 Colo. App. 384, 513 P.2d 1082 (1973) (citing RESTATEMENT OF TORTS § 766 (1938)); **W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS** § 129 (5th ed. 1984); and **2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS** §§ 6.5–6.10 (3d ed. 2006). *See also* **Mem’l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.**, 690 P.2d 207 (Colo. 1984) (supports numbered paragraph 4); **Pierce v. St. Vrain Valley Sch. Dist.** RE-1J, 944 P.2d 646 (Colo. App. 1997) (supports numbered paragraph 1 of instruction), *rev’d on other grounds*, 981 P.2d 600 (Colo. 1999); **Fasing v. LaFond**, 944 P.2d 608 (Colo. App. 1997) (supports numbered paragraph 1 of instruction); **Galleria Towers, Inc. v. Crump Warren & Sommer, Inc.**, 831 P.2d 908 (Colo. App. 1991); **Boettcher DTC Bldg. Joint Venture v. Falcon Ventures**, 762 P.2d 788 (Colo. App. 1988); **Bithell v. W. Care Corp.**, 762 P.2d 708 (Colo. App. 1988) (supports numbered paragraph 2 in particular); **Hein Enters., Ltd. v. San Francisco Real Estate Investors**, 720 P.2d 975 (Colo. App. 1985) (supports numbered paragraph 3 in particular); **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (1979). *But see* **Baker v. Carpenter**, 33 Colo. App. 139, 143, 516 P.2d 459, 461 (1973) (The court stated in dictum: “[O]ne does not induce a seller to breach a contract with a third person when he merely enters into an agreement with the seller with knowledge that the seller cannot perform both it and his contract with the third person.”).

2. A claim for interference with contract is based on contracts that existed at the time of the allegedly tortious conduct, including both contracts terminable at will and contracts not terminable at will. *See, e.g., Mem'l Gardens, Inc.*, 690 P.2d at 211–12 (involving contracts not terminable at will); **Harris Grp., Inc. v. Robinson**, 209 P.3d 1188 (Colo. App. 2009) (at-will contract); **Electrolux Corp. v. Lawson**, 654 P.2d 340 (Colo. App. 1982) (at-will contract).

3. The companion tort of intentional interference with a prospective business advantage has also been recognized. **Amoco Oil Co. v. Ervin**, 908 P.2d 493 (Colo. 1995) (tortious interference with prospective business relationship requires showing that interference with formation of contract was both intentional and improper); **Emp't Television Enters., LLC v. Barocas**, 100 P.3d 37 (Colo. App. 2004) (threat of legal action that the defendant believed was without merit and that induced plaintiff to abandon plans to enter into business relationship with third party could be basis of claim); **Montgomery Ward & Co. v. Andrews**, 736 P.2d 40 (Colo. App. 1987); **Dolton v. Capitol Fed. Sav. & Loan Ass'n**, 642 P.2d 21 (Colo. App. 1981) (no underlying contract necessary for claim of interference with prospective business relation); *see also* **Clancy Sys. Int'l, Inc. v. Salazar**, 177 P.3d 1235 (Colo. 2008) (availability of UCC claim based on same facts precluded common-law tortious interference with prospective business advantage claim); **BA Mortg., LLC v. Quail Creek Condo. Ass'n**, 192 P.3d 447 (Colo. App. 2008) (no improper interference where homeowners association had right under homeowners declarations and statute to file lien assessment, even though association's conduct had the effect of clouding title of foreclosing lender, and there was no contract between lender and association); **Wasalco, Inc. v. El Paso County**, 689 P.2d 730 (Colo. App. 1984) (tort of interference with a prospective business advantage does not require proof of an underlying contract, while tort of intentional interference with a contractual obligation does).

4. The contract involved must be a valid contract. **Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1**, 2018 COA 92, ¶ 54 (“So if for any reason a contract is entirely void, there is no liability for causing its breach.” (quoting RESTATEMENT (SECOND) OF TORTS § 766 cmt. f (1979))); **Condo v. Conners**, 271 P.3d 524 (Colo. App. 2010) (operating agreement of limited liability company rendered assignment of limited liability company interest without member consents void and precluded claim based on interference with the assignment), *aff'd*, 266 P.2d 1110 (Colo. 2011).

5. The proper defendant in an action alleging the tort of interference with the formation of a contract is the interfering third party, not the party with whom the plaintiff sought to contract. **L & M Enters., Inc. v. City of Golden**, 852 P.2d 1337 (Colo. App. 1993).

6. Where there is no dispute that the defendant was privileged to interfere with the contract and would not be liable in absence of the plaintiff's proving the privilege was abused, *see* Instruction 24:6, this

instruction may be modified to include the elements of abuse the plaintiff would need to prove, rather than giving Instruction 24:6 as a separate instruction. **Boettcher DTC Bldg. Joint Venture**, 762 P.2d at 791; *see also* **Westfield Dev. Co. v. Rifle Inv. Assocs.**, 786 P.2d 1112 (Colo. 1990). In **Westfield Dev. Co.**, 786 P.2d at 1117, the court, relying on the language of RESTATEMENT (SECOND) OF TORTS §§ 766A and 767 (1979), stated that the interference had to be both intentional and improper. However, again relying on RESTATEMENT § 773, the court makes clear that once the plaintiff proves that the defendant intentionally interfered with the contract and caused damage, the burden of proving that the occasion was a privileged one, i.e., that the conduct was prima facie proper, is on the defendant as an affirmative defense, unless the plaintiff's own evidence establishes that fact or the fact is not in dispute. The plaintiff has the burden of proving that the defendant's conduct was both improper and intentional. If the defendant has raised privilege as an affirmative defense, the defendant has the burden of proving that the privilege exists, and the plaintiff has the burden of proving that the defendant abused any privilege. *See* Instruction 24:6; *see also* **Lutfi v. Brighton Cmty. Hosp. Ass'n**, 40 P.3d 51 (Colo. App. 2001) (trial court properly entered summary judgment in favor of defendant on plaintiff's claim for intentional interference with contract where plaintiff presented no evidence to establish that defendant's conduct was improper); **Swartz v. Bianco Family Trust**, 874 P.2d 430 (Colo. App. 1993) (indicating that improper motive is element of claim).

7. For a discussion as to whether a statute or administrative regulation can provide an absolute right to intentionally interfere with contract relations or prospective economic advantage, *see* **Omedelena v. Denver Options, Inc.**, 60 P.3d 717 (Colo. App. 2002).

8. A plaintiff whose own performance of a contract was prevented by the wrongful interference of the defendant, thereby causing the plaintiff to breach his or her contract with a third person, may also have a cause of action. HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 6.9, at 379–82. This instruction, however, is not intended to cover such cases.

9. For cases concerning additional civil liability for inducing a breach of an agricultural cooperative marketing association agreement, *see* section 7-56-504, C.R.S. *See also* **Rinnander v. Denver Milk Producers**, 114 Colo. 506, 166 P.2d 984 (1946).

10. There is some authority to the effect that, where the interference is with a master-servant relationship, the defendant may be liable on a theory of negligence; that is, the defendant's conduct need not be intentional. In such a case, this instruction would not be appropriate. *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 129, at 998.

11. An agent may be liable to a third person for intentionally interfering "improperly" with a contract between that person and the agent's principal. The existence of the agency relationship is relevant in

determining whether the agent acted properly. An agent or corporate officer abuses his or her qualified privilege if the interference is not done for bona fide organizational purposes, but is motivated by a desire to do one of the contracting parties harm. **Trimble v. City & Cty. of Denver**, 697 P.2d 716 (Colo. 1985); *see also* **Krystowiak v. W.O. Brisben Cos.**, 90 P.3d 859 (Colo. 2004); **Corporon v. Safeway Stores, Inc.**, 708 P.2d 1385 (Colo. App. 1985). Similarly, except where a subsidiary corporation is an alter ego of its parent corporation, it may be held liable for intentionally interfering with a contract between its parent and another. **Friedman & Son, Inc. v. Safeway Stores, Inc.**, 712 P.2d 1128 (Colo. App. 1985). As to the factors for determining whether a subsidiary was only an alter ego of the parent, *see* **Friedman & Son, Inc.**, 712 P.2d at 1131.

12. A personal representative of a decedent's estate may not be held personally liable for tortiously interfering with a contract between the decedent and a third party. **Colo. Nat'l Bank of Denver v. Friedman**, 846 P.2d 159 (Colo. 1993).

13. A claim for tortious interference with contract cannot be maintained among parties to the same contract. **MDM Grp. Assocs., Inc. v. CX Reinsurance Co.**, 165 P.3d 882 (Colo. App. 2007).

14. Under the Colorado Governmental Immunity Act, a municipality is immune from liability for the tort of intentional interference with a contractual obligation. **Grimm Constr. Co. v. Denver Bd. of Water Comm'rs**, 835 P.2d 599 (Colo. App. 1992).

**24:2 INTENTIONAL CONDUCT—DEFINED**

Conduct is intentional if a person acts or speaks for the purpose, in whole or in part, of bringing about a particular result, or if a person knows his or her acts or words are likely to bring about that result. It is not necessary that a person act or speak with malice or ill will, but the presence or absence of malice or ill will may be considered by you in determining if the conduct is intentional.

**Notes on Use**

This instruction should be given whenever Instruction 24:1 is given.

**Source and Authority**

This instruction is supported by **Watson v. Settlemyer**, 150 Colo. 326, 372 P.2d 453 (1962) (by implication); RESTATEMENT (SECOND) OF TORTS § 766 (1979) cmts. j, r, s; and 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 6.8 (3d ed. 2006). *See also* **Rinnander v. Denver Milk Producers**, 114 Colo. 506, 166 P.2d 984 (1946).

## 24:3 IMPROPER—DEFINED

**The defendant's interference with the contract was improper if you find that** (*insert those facts that the plaintiff claims constitute improper conduct and that, if established, would constitute improper conduct as a matter of law*).

### Notes on Use

1. The court should define in this instruction the alleged conduct which, if proven, would be improper interference. **Harris Grp., Inc. v. Robinson**, 209 P.3d 1188 (Colo. App. 2009) (holding that interfering with employment contracts through tortious conduct (conversion and breach of fiduciary duty) amounted to “improper” interference with contractual relations).

2. It is error to instruct the jury on improper conduct that is not supported by the evidence. **Harris Grp.**, 209 P.3d at 1200 (correct jury instructions should have “(1) excluded the wrongful means unsupported by the evidence—physical violence, threats of criminal prosecution, or threats of civil suit; (2) excluded the tort—intentional interference with contract—to which the business competition privilege applied; and (3) added the torts—conversion and breach of fiduciary duty—that qualified as wrongful means.”)

3. Where there is no dispute that the defendant was privileged to interfere with the contract, this instruction should be modified to instruct the jury on alleged conduct which, if proven, would constitute abuse of the privilege. In such event, Instruction 24:6 should not be given as a separate instruction. *See also* **Amoco Oil Co. v. Ervin**, 908 P.2d 493 (Colo. 1995) (holding the claim should not have been submitted to the jury where evidence was undisputed that defendant was privileged competitor and did not use wrongful means to interfere with plaintiffs' prospective business relations).

### Source and Authority

1. This instruction is supported by **Westfield Development Co. v. Rifle Investment Associates**, 786 P.2d 1112, 1118 (Colo. 1990) (“Even if the interference is intentional, therefore, liability does not attached unless the court concludes that the actor's conduct is also improper.”). *See also* **Trimble v. City and Cty. of Denver**, 697 P.2d 716 (Colo. 1985); **Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.**, 690 P.2d 207 (Colo. 1984).

2. Whether conduct is “improper” must be made by the court in the specific facts and circumstances in the case, and include weighing pub-

lic policy interest in protecting the freedom to compete in the marketplace. **Warne v. Hall**, 2016 CO 50, ¶ 25, 373 P.3d 588, 596 (“Because it is so clearly dependent upon context and circumstances, we have never attempted to rigidly define ‘improper’ for all purposes of interference with contract, but we have favorably referenced the Restatement (Second) of Torts § 767 (Am. Law Inst. 1965), in this regard and its enumeration of potentially relevant factors, which includes the nature of the actor’s conduct, the actor’s motive, the interests of the other with which the actor’s conduct interferes, the interests sought to be advanced by the actor, the social interests in protecting the freedom of action of the actor and the contractual interests of the other, the proximity or remoteness of the actor’s conduct to the interference, and the relation between the parties.”). *See also Westfield Dev. Co. v. Rifle Inv. Assocs.*, 786 P.2d 1112 (Colo. 1990) (applying the RESTATEMENT (SECOND) OF TORTS § 767 to determine whether conduct interfering with a contract or prospective business relation is improper).

## 24:4 INTERFERENCE—DEFINED

**Interference means intentional conduct (that causes another to terminate or not to perform a contract) (or) (that makes another's performance of a contract impossible or more difficult).**

### Notes on Use

This instruction should be given with Instruction 24:1 whenever that instruction is given using the word “interfered” in numbered paragraph 3.

### Source and Authority

This instruction is supported by W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 991 (5th ed. 1984); and 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 6.9 (3d ed. 2006).

## 24:5 CONTRACTS TERMINABLE AT WILL OR VOIDABLE

It is not a defense to the plaintiff's claim of intentional interference with contract that the contract between the plaintiff (*name*) and (*name of third person*) could have been (canceled [for no reason] [because of (*describe the reason, e.g., the legal disability of the third person*)]) (terminated at will).

### Notes on Use

1. This cautionary instruction should not be given unless some reference concerning terminability or voidability has been made before to the jury.

2. Use whichever parenthesized words are appropriate.

3. This instruction does not apply where the contract is illegal or otherwise void as being against public policy. **Colo. Accounting Machs., Inc. v. Mergenthaler**, 44 Colo. App. 155, 609 P.2d 1125 (1980); *see also* **Dolton v. Capitol Fed. Sav. & Loan Ass'n**, 642 P.2d 21 (Colo. App. 1981) (no liability for inducing a breach of a contract made void by statute because even if oral contract existed, specific language of applicable statute of frauds rendered contract void).

### Source and Authority

1. This instruction is supported by **Harris Group, Inc. v. Robinson**, 209 P.3d 1188 (Colo. App. 2009) (contract at will entitled to less protection in business competition than contract not terminable at will); **Electrolux Corp. v. Lawson**, 654 P.2d 340 (Colo. App. 1982) (where privilege of competition exists, causing a third person to terminate a contract terminable at will not improper unless wrongful means, such as physical violence, fraud, etc., are used); and **Mulei v. Jet Courier Serv., Inc.**, 739 P.2d 889 (Colo. App. 1987), *rev'd in part on other grounds*, 771 P.2d 486 (Colo. 1989). *See also* Instruction 24:6. "A contract terminable at will is one that may be terminated at any time without legal consequence; that is, there is no breach if the contract is terminated." **Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.**, 690 P.2d 207, 212 (Colo. 1984) (supporting the instruction by implication, but holding the contract was not terminable at will). Thus, even though the fact that a contract is terminable at will is not a defense, the affirmative defense of justifiable business competition has been recognized as being particularly applicable in such cases.

2. The fact that the contract may have been terminable at the will of the third person does not deprive the plaintiff of his or her claim for relief. **Watson v. Settlemeyer**, 150 Colo. 326, 372 P.2d 453 (1962);

**Bithell v. W. Care Corp.**, 762 P.2d 708 (Colo. App. 1988); **Zappa v. Seiver**, 706 P.2d 440 (Colo. App. 1985); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 995–96 (5th ed. 1984). However, such fact may be relevant on the issues of damages and privilege. See **Harris Grp., Inc.**, 209 P.3d at 1202–03; PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 129, at 996.

3. Although the contract with the third person must be “valid” in the sense of not being illegal or against public policy, the fact that the third person may be in a position to resist enforcement of the contract because of some defense making the contract voidable (statute of frauds, minority, etc.) does not generally deprive the plaintiff of his or her claim for relief. See RESTATEMENT (SECOND) OF TORTS § 766 cmts. f & g (1979); PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 129, at 994–95; 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 6.7, at 368–72 (3d ed. 2006); see also **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (1979).

## 24:6 AFFIRMATIVE DEFENSE—PRIVILEGE— WHEN EXISTENT—WHEN LOST

**For the defendant to establish (his) (her) (its) affirmative defense of privilege (he) (she) (it) has the burden of proving (all of the following):**

*(Insert those facts that the defendant claims gives him or her a privilege and that, if true, would give the defendant a privilege as a matter of law.)*

**(Even though the defendant proves [his] [her] [its] affirmative defense of privilege, that defense is lost if the plaintiff proves that the defendant abused [his] [her] [its] privilege. The defendant abused [his] [her] [its] privilege if [describe those facts that the plaintiff claims constitute and that would constitute an abuse of privilege as a matter of law.]**

### Notes on Use

This instruction should be given only if there is sufficient evidence in the case for a reasonable jury to reasonably conclude the truth of facts which, as a matter of law, would give the defendant a privilege. See **Westfield Dev. Co. v. Rifle Inv. Assocs.**, 786 P.2d 1112 (Colo. 1990) (privilege to initiate litigation and filing of *lis pendens* that interferes with a third person's performance of contract is a qualified, not an absolute, privilege).

### Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 768 (1979), which was specifically applied in Colorado in **Harris Group, Inc. v. Robinson**, 209 P.3d 1188 (Colo. 2009), for cases involving intentional interference with contracts terminable at will. See also **Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.**, 690 P.2d 207 (Colo. 1984) (by implication, but holding the contract was not terminable at will); **McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body**, 799 P.2d 394 (Colo. App. 1989) (privilege is lost if the competitor employs "wrongful means"); **Electrolux Corp. v. Lawson**, 654 P.2d 340 (Colo. App. 1982) (where privilege of business competition exists, causing third person to terminate a contract terminable at will not improper unless wrongful means, such as physical violence, fraud, etc., are used); **Dolton v. Capitol Fed. Sav. & Loan Ass'n**, 642 P.2d 21 (Colo. App. 1981) (privilege expressly adopted in case of companion tort of intentional interference with a prospective business advantage). "Wrongful means" includes the commission of in-

dependent torts, such as conversion and breach of fiduciary duty. **Harris Grp., Inc.**, 209 P.3d at 1200.

2. For factors to consider in determining whether there is abuse of the business competition privilege when the claim involves interference with at-will contracts or prospective contractual relations, see RESTATEMENT § 768:

- (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if:
  - (a) the relation concerns a matter involved in the competition between the actor and the other and
  - (b) the actor does not employ wrongful means and
  - (c) his action does not create or continue an unlawful restraint of trade and
  - (d) his purpose is at least in part to advance his interest in competing with the other.
- (2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

See **Harris Grp., Inc.**, 209 P.3d at 1200 (wrongful means include using breach of fiduciary duty and conversion as a means to induce plaintiff's customers and employees to terminate at-will contracts); **Mulei v. Jet Courier Serv., Inc.**, 739 P.2d 889 (Colo. App. 1987), *rev'd in part on other grounds*, 771 P.2d 486 (Colo. 1989); see also **Mem'l Gardens, Inc.**, 690 P.2d at 210–11; **Electrolux Corp. v. Lawson**, 654 P.2d at 341–42.

3. Once the plaintiff has established a prima facie case of liability, the burden of establishing that the defendant's conduct was justified, i.e., privileged, shifts to the defendant. 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 6.12 (3d ed. 2006); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 983–84 (5th ed. 1984). Regardless of what other circumstances might have given the defendant a privilege, the defendant may not be privileged if the conduct was engaged in solely to cause harm to the plaintiff, 2 HARPER, JAMES AND GRAY ON TORTS, *supra*, at 418–19, or if the conduct was otherwise tortious or in some other way illegal. See RESTATEMENT § 767 cmt. c; see also **Bithell v. W. Care Corp.**, 762 P.2d 708, 712 (Colo. App. 1988) (“A public official

performing discretionary acts within the scope of his office enjoys [a] qualified immunity . . . but only insofar as his conduct is not willful, malicious, or intended to cause harm.”).

4. The defendant may have been privileged to act as the defendant did for the purpose of protecting some interest of his or her own or some third person or that of the public, including the interest of business competition. For illustrations of other such interests and circumstances, see *HARPER, JAMES AND GRAY ON TORTS, supra*, §§ 6.12 and 6.13; *PROSSER AND KEETON ON THE LAW OF TORTS, supra*, § 129, at 985–89; and *RESTATEMENT* §§ 767–774.

5. Where there is no dispute that the defendant was privileged to interfere with the contract and would not be liable in absence of the plaintiff’s proving the privilege was abused, Instruction 24:1 (elements of liability) may be modified to include the elements of abuse the plaintiff would need to prove, rather than giving this instruction as a separate instruction. **Boettcher DTC Bldg. Joint Venture v. Falcon Ventures**, 762 P.2d 788 (Colo. App. 1988).

6. Though an agent or corporate officer may be privileged to interfere with a contract between the principal and another, such privilege is only a qualified privilege that may be lost if the agent abuses the privilege by acting improperly. **Trimble v. City & Cty. of Denver**, 697 P.2d 716 (Colo. 1985) (agent abused privilege when the interference was not done for bona fide organizational purposes but was motivated solely by a desire to do harm to one of the contracting parties); **Bithell**, 762 P.2d at 713 (corporate directors have qualified privilege to communicate with each other about corporate affairs, but such privilege is lost if communications are not made in good faith, or are made with malice or with reckless disregard for their truth); **Zappa v. Seiver**, 706 P.2d 440 (Colo. App. 1985) (officer or director of corporation is not privileged if his or her sole motivation is to cause the corporation to breach its contract with the plaintiff or to interfere with the contractual relations between the corporation and the plaintiff); *see also Cronk v. Intermountain Rural Elec. Ass’n*, 765 P.2d 619 (Colo. App. 1988).

7. In **Martin v. Montezuma-Cortez School District RE-1**, 841 P.2d 237 (Colo. 1992), the court ruled that striking public school teachers could not be held liable to school district for tortious interference with contracts of other teachers where strike was legal.

8. The absolute privilege that shields attorneys from defamation claims arising out of statements made during preparation for litigation or in the course of judicial proceedings also bars other non-defamation claims that stem from the same conduct, including claims for intentional interference with a contractual relationship. **Buckhannon v. U.S. W. Commc’ns, Inc.**, 928 P.2d 1331 (Colo. App. 1996).

## 24:7 ACTUAL OR NOMINAL DAMAGES

**Plaintiff, (name), has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) (its) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the interference by the defendant(s), (name[s]) with plaintiff's contract, (and the [insert appropriate description, e.g., "negligence"], if any, of any designated nonparties).**

**In determining these damages, you shall consider the following:**

**1. Any noneconomic losses or injuries that plaintiff has had or probably will have in the future, including: [insert any recoverable noneconomic losses for which there is sufficient evidence]; and**

**2. Any economic losses that plaintiff has had or probably will have in the future, including: [insert any recoverable economic losses for which there is sufficient evidence].**

**If you find in favor of the plaintiff but do not find any actual damages, you shall award (him) (her) (it) nominal damages of one dollar.**

### Notes on Use

Because the fact situations to which this instruction would be applicable are so varied, no attempt has been made to itemize the elements of damage that the plaintiff may legally be entitled to recover, or to specify the relevant factors a jury may or should take into account in determining the amount of any particular element of damage.

### Source and Authority

1. This instruction is supported by **Westfield Development Co. v. Rifle Investment Associates**, 786 P.2d 1112 (Colo. 1990), the court articulated several rules of damages. Because intentional interference with contract is a tort, the measure of damages may depart from contractual damages when necessary to make the innocent party whole.

Such damages may be for emotional distress only. However, to award any damages for emotional distress, such distress must have been a reasonably expectable result of the interference. Finally, under ordinary circumstances, only parties to a contract may recover damages for intentional interference with the contract. *See also Ervin v. Amoco Oil Co.*, 885 P.2d 246 (Colo. App. 1994) (emotional distress is compensable injury in action for intentional interference with prospective business relationship if emotional distress damages could be reasonably expected to result from defendant's tortious conduct), *aff'd in part, rev'd in part on other grounds*, 908 P.2d 493 (Colo. 1995); *Batterman v. Wells Fargo Ag Credit Corp.*, 802 P.2d 1112 (Colo. App. 1990) (court quoted and approved RESTATEMENT (SECOND) OF TORTS § 774A(1) (1979) regarding compensable damages). For a discussion of damages, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 1002–04 (5th ed. 1984) (indicating basically three different views concerning allowable damages). *See also Hein Enters., Ltd. v. San Francisco Real Estate Inv'rs*, 720 P.2d 975 (Colo. App. 1985) (loss of business advantage or opportunity recoverable, which “may include loss of profits and chances for gain”); RESTATEMENT § 774A.

2. Unlike other nominal damage torts, e.g., trespass to land, the law does not presume the existence of actual damages. Proof of actual damages is a necessary element of the plaintiff's claim for relief. *Rywalt v. Writer Corp.*, 34 Colo. App. 334, 526 P.2d 316 (1974). On the other hand, if the plaintiff proves he or she sustained some damages, but produces insufficient evidence from which the amount of such damages can be determined, the plaintiff is nonetheless entitled to nominal damages. PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 129, at 1002–03.

3. Under appropriate circumstances, *see* Instruction 5:4, plaintiff may also recover punitive damages. *See* S. Johnson, Annotation, *Punitive Damages for Interference With Contract or Business Relationship*, 44 A.L.R. 4th 1078 (1986).

4. In order to avoid double recovery of actual damages, where a plaintiff has received compensation from the person with whom the plaintiff contracted for that person's breach of contract caused by interference of the defendant, the amount of that compensation must be credited against any actual damages the plaintiff may recover from the defendant for having caused the breach. Also, where the contract with which the defendant interfered provided for liquidated damages that have been paid to, and accepted by, the plaintiff, generally no additional actual damages may be recovered by the plaintiff. *Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.*, 690 P.2d 207 (Colo. 1984).

5. Where, as a result of the defendants' tortious interference with the plaintiff's contract, the plaintiff incurs attorney fees in litigating other claims against the defendants and a third-party, plaintiff is entitled to recover those attorney fees as damages; however, the plaintiff

is not entitled to recover those fees incurred in litigating the tortious interference with contract claim itself. **Swartz v. Bianco Family Tr.**, 874 P.2d 430 (Colo. App. 1993). Litigation costs incurred by a party in separate litigation may sometimes be an appropriate measure of compensatory damages against another party. **Rocky Mtn. Festivals, Inc. v. Parsons Corp.**, 242 P.3d 1067 (Colo. 2010).

## CHAPTER 25. BAD FAITH BREACH OF INSURANCE CONTRACT

- 25:1 Elements of Liability—Third-Party Claims
- 25:2 Elements of Liability—First-Party Common-Law Claims
- 25:3 Unreasonable Conduct/Unreasonable Position—Common-Law Claims—Defined
- 25:4 Elements of Liability—First-Party Statutory Claims
- 25:5 Unreasonable Delay or Denial
- 25:6 Unreasonable Conduct/Unreasonable Position—Statutory Violations—Defined
- 25:7 Reckless Disregard—Defined
- 25:8 Duty of Good Faith and Fair Dealing
- 25:9 Actual Damages—Common-Law Claims
- 25:10 Benefit Amount—First-Party Statutory Claims
- 25:11 Punitive Damages

### 25:1 ELEMENTS OF LIABILITY—THIRD-PARTY CLAIMS

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on *(his)* *(her)* *(its)* claim of bad faith breach of insurance contract, you must find all the following have been proved by a preponderance of the evidence:

1. The plaintiff had *(injuries)* *(damages)* *(losses)*;
2. The defendant acted unreasonably in *(insert appropriate description, e.g., "failing to settle the claim [name of third party] made against the plaintiff")*; and
3. The defendant's unreasonable *(conduct)* *(position)* was a cause of the plaintiff's *(injuries)* *(damages)* *(losses)*.

If you find that any one or more of these *(number)* statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these

(number) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to plaintiff's claim]*).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. Omit any numbered paragraph involving facts that are not in dispute, and modify this instruction to include additional numbered paragraphs covering any other disputed preliminary matters upon which liability may depend (e.g., whether a valid insurance contract was in effect at the time).

2. Use whichever parenthesized words are appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

3. This instruction is for use in third-party situations such as that in **Farmers Group, Inc. v. Trimble**, 691 P.2d 1138 (Colo. 1984) (liability claims by third parties against insured). *See also Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 414 (Colo. 2004) ("Third-party bad faith arises when an insurance company acts unreasonably in investigating, defending, or settling a claim brought by a third person against its insured under a liability policy."); **Silva v. Basin W., Inc.**, 47 P.3d 1184 (Colo. 2002) (discussing distinction between third-party and first-party claims for bad faith breach of insurance contract); **Olson v. State Farm Mut. Auto. Ins. Co.**, 174 P.3d 849 (Colo. App. 2007) (same).

4. Instruction 25:2 should be used in first-party cases where an insured brings a common-law direct action for bad faith breach of insurance contract against an insurer. *See Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985) (requiring insurer knowledge or reckless disregard of its unreasonable conduct).

5. Instruction 25:4 should be used in first-party cases where an

insured brings a statutory claim against an insurer based on section 10-3-1116(1), C.R.S., for unreasonable delay in paying or denial of benefits. **Kisselman v. Am. Family Ins. Co.**, 292 P.3d 964 (Colo. App. 2011) (requiring only proof of insurer unreasonable conduct in denying or delaying payment of a claim without a reasonable basis).

6. *See also* section 10-3-1113(2) and (3), C.R.S. (permitting trier of fact to consider conduct of insurer prohibited by statute as evidence of unreasonable delay or denial of payment of insurance benefits), and sections 10-3-1115 and 10-3-1116, C.R.S. (permitting certain statutory first-party claims).

7. This instruction should be appropriately modified when the alleged bad faith breach of insurance contract relates to insurer conduct other than denial of or delay in paying indemnity benefits. The duty of an insurer to act in good faith toward its insured extends to the entire relationship between insurer and insured and is not limited to claims handling payment decisions. *See Ballow v. PHICO Ins. Co.*, 875 P.2d 1354 (Colo. 1993); *see also Dale v. Guar. Nat'l Ins. Co.*, 948 P.2d 545 (Colo. 1997); **Dunn v. Am. Family Ins.**, 251 P.3d 1232 (Colo. App. 2010) (good-faith duty includes adjustment of claim and all aspects of investigation and handling); **Bankruptcy Estate of Morris v. COPIC Ins. Co.**, 192 P.3d 519 (Colo. App. 2008) (tort encompasses all dealings between parties, including conduct occurring before, during, and after trial).

8. Appropriate instructions defining the terms used in this instruction must also be given. **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995) (failure to define standard of care in terms of reasonableness was reversible error); *see* Instruction 25:3 (defining “unreasonable conduct” and “unreasonable position”); *see also* Instructions 9:18–9:21 (relating to causation). Instruction 25:6 may also be given with this instruction.

9. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

10. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, *see* the Notes on Use to Instruction 4:20 (model unified verdict form).

### Source and Authority

1. This instruction is supported by **Trimble**, 691 P.2d at 1141, and section 10-3-1113(2). *See also Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139 (Colo. 2007); **Goodson**, 89 P.3d at 414; **Olson v. State Farm Mut. Auto. Ins. Co.**, 174 P.3d 849 (Colo. App. 2007).

2. In **Trimble**, the court noted that an insurer must act in good faith and deal fairly with its insured, and that in third-party cases, the insurer “stands in a position similar to that of a fiduciary.” **Trimble**, 691 P.2d at 1141. *See also* § 10-1-101, C.R.S. (“[A]ll persons having to do with insurance services to the public [shall] be at all times actuated by good faith in everything pertaining thereto . . .”). Insurers owe their insureds a quasi-fiduciary duty in the third-party context.

3. An entity that self-insures through a captive insurance company “functions like a traditional insurance company.” *See Compton v. Safeway, Inc.*, 169 P.3d 135, 137 (Colo. 2007) (granting motion to compel discovery of statements withheld under work product doctrine).

4. Self-insurance pools for special districts are separate entities “created by intergovernmental contract” and are thus “public entities” immune from tort liability for bad faith breach of insurance contract under the Colorado Governmental Immunity Act. **Colo. Special Dists. Prop. & Liab. Pool v. Lyons**, 2012 COA 18, ¶¶ 28–29, 277 P.3d 874 (citing **City of Arvada v. Colo. Intergovernmental Risk Sharing Agency**, 19 P.3d 10 (Colo. 2001)). A nonprofit intermediary formed by various counties to provide technical services to self-insurance pools is also immune from liability under the CGIA as an “instrumentality” of the Pool, and alternatively, as a separate public entity created by intergovernmental cooperation. *Id.* at ¶¶ 45–47.

5. Following denial of coverage by its CGL insurer for losses associated with the tear-out and replacement of non-defective work performed by a third-party, a pool subcontractor brought claims against the carrier, an outside claims adjusting company, and an adjuster employee. Finding a covered occurrence, the court of appeals, without discussion, held that the negligent misrepresentation claim based upon allegations that the adjuster stated that the policy would cover the losses presented fact issues as to justifiable reliance that required remand for trial. A conflict between a confirmation of coverage by an insurer’s agent and a policy term will not defeat, as a matter of law, an insured’s assertion of justifiable reliance when the representation involves an ambiguous policy term. **Colo. Pool Sys., Inc. v. Scottsdale Ins. Co.**, 2012 COA 178, ¶ 61, 317 P.3d 1262. *See* 25:2, Source & Authority 11.

### **Liability Insurer’s Duty to Defend**

6. Several cases discuss an insurer’s duty to defend against third-party claims. *See Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814 (Colo. 2004); **Thompson v. Md. Cas. Co.**, 84 P.3d 496 (Colo. 2004); **Compass Ins. Co. v. City of Littleton**, 984 P.2d 606 (Colo. 1999); **Bohrer v. Church Mut. Ins. Co.**, 965 P.2d 1258 (Colo. 1998); **Constitution Assocs. v. N.H. Ins. Co.**, 930 P.2d 556 (Colo. 1996); **Hecla Mining Co. v. N.H. Ins. Co.**, 811 P.2d 1083 (Colo. 1991); **TCD, Inc. v. Am. Family Mut. Ins. Co.**, 2012 COA 65, ¶ 11, 296 P.3d 255; **Fire Ins. Exch. v. Sullivan**, 224 P.3d 348 (Colo. App. 2009);

**Miller v. Hartford Cas. Ins. Co.**, 160 P.3d 408 (Colo. App. 2007) (duty to defend broader than duty to indemnify); **Bainbridge, Inc. v. Traveler's Cas. Co.**, 159 P.3d 748 (Colo. App. 2006); **Leprino v. Nationwide Prop. & Cas. Ins. Co.**, 89 P.3d 487 (Colo. App. 2003); **Fire Ins. Exch. v. Bentley**, 953 P.2d 1297 (Colo. App. 1998); **Horace Mann Ins. Co. v. Peters**, 948 P.2d 80 (Colo. App. 1997).

7. A liability insurer's duty to defend and its duty to indemnify are separate and distinct. **Hecla Mining Co.**, 811 P.2d at 1086 n.5. Therefore, a bad faith claim for their breach may accrue at different times. **Daugherty v. Allstate Ins. Co.**, 55 P.3d 224 (Colo. App. 2002) (claim based on failure to defend accrues when insured is named in a complaint and is aware of insurer's refusal of coverage; claims based on liability insurer's failure to indemnify accrue when judgment enters against the insured).

8. The ultimate determination of a liability insurer's duty to defend differs as between those insurers that provide a defense under a reservation of rights until completion of the underlying litigation and those that refuse to defend. **Cotter Corp.**, 90 P.3d at 827. Whether an insurer ultimately has a duty to indemnify ordinarily presents a fact issue to be determined based upon evidence extrinsic to the complaint after the insured's liability is fixed through trial or settlement. **Cyprus Amax Minerals Co. v. Lexington Ins. Co.**, 74 P.3d 294, 301 (Colo. 2003) (while the duty to defend under a standard liability policy is triggered when allegations of a complaint, liberally construed, state an arguably covered claim, the duty to indemnify arises "only when the policy actually covers the harm and typically cannot be determined until the resolution of the underlying claims"; construing a pure indemnity policy); *see also* **Thompson**, 84 P.3d at 502 (duty to defend against specified causes of action is determined by comparing factual allegations in the complaint, without regard to claim labels, with legal elements of covered claims as defined by case law); **Lafarge N. Am., Inc. v. K.E.C.I. Colo., Inc.**, 250 P.3d 682 (Colo. App. 2010) (under indemnification clause of construction contract, duty to indemnify not triggered until fault determined, while duty to defend triggered by mere allegation of fault).

9. An insurer defending an insured under a reservation of rights "does not ordinarily waive its policy defenses by payment of settlement proceeds to a claimant." **Mt. Hawley Ins. Co. v. Casson Duncan Constr., Inc.**, 2016 COA 164, ¶ 8, 409 P.3d 619 (citing **Nikolai v. Farmers All. Mut. Ins. Co.**, 830 P.2d 1070, 1073 (Colo. App. 1991)). Indemnity coverage issues between insurer and insured when the insurer settles a third-party claim defended under a reservation of rights may be determined in a declaratory judgment or garnishment proceeding. *Id.* (citing **Bohrer**, 965 P.2d at 1261-67 & n.7).

10. **Hecla Mining Co.**, 811 P.2d at 1083, 1089, held that an insurer that defends the insured under a reservation of rights may seek reimbursement of defense costs after settlement or following trial if the

facts at trial or determined in a declaratory judgment action prove that the claim was not covered.

11. The **Hecla** remedy seeking reimbursement of defense costs does not extend to costs taxed against an insured paid by the insurer unless expressly provided in the policy. “Defense costs” are different from “taxable costs” in liability policies that contains a separate supplementary payments section providing that the insurer will pay taxable costs for “any claim” that the insurer defends or settles. **Mt. Hawley Ins. Co.**, 2016 COA 164, ¶¶ 10–25 (rejecting insurer’s argument that the policy supplemental payment provision was “superseded” by its reservation of rights letter).

12. A liability insurer’s refusal to defend an action brought against the insured arises in the third-party context and is governed by the standard of reasonableness under the circumstances. **Nunn v. Mid-Century Ins. Co.**, 244 P.3d 116 (Colo. 2010) (citing **Trimble**, 691 P.2d at 1142); **Goodson**, 89 P.3d at 415 (same); **Wheeler v. Reese**, 835 P.2d 572 (Colo. App. 1992) (same). *But see* § 13-20-808(b)(II), C.R.S. (the legislature has declared that the duty to defend under a liability policy issued to a construction professional is a “first-party benefit to and claim on behalf of the insured”).

### Assignments of Insured’s Claims

13. In **Bashor v. Northland Insurance Co.**, 29 Colo. App. 81, 480 P.2d 864 (1970), *aff’d*, 177 Colo. 463, 494 P.2d 1292 (1972), a jury trial resulted in a judgment in excess of insurance policy limits against an insured whose liability insurer failed to settle a third-party claim within those limits. After the judgment creditor attempted to execute on the judgment, the insured agreed to pay the injured party only a portion of the judgment and to pursue claims against the insurer and share any recovery with the plaintiff in return for an agreement that plaintiff would cease further efforts to execute on the judgment. Based on the wording of the contract specifying that there would be no satisfaction of the judgment until the insured exhausted his remedies against the insurer, the court rejected the insurer’s argument that the agreement not to execute was a satisfaction of the remaining judgment that limited its liability to the payment made by the insured.

14. In **Old Republic Insurance Co. v. Ross**, 180 P.3d 427 (Colo. 2008), the supreme court addressed, as a matter of first impression, the enforceability of a **Bashor**-type agreement based on a stipulated judgment entered into without a trial. The court held that, “where the insurer has conceded coverage and defended its insured, and where there has been no finding of bad faith against the insurer, the insurer cannot be bound by a pretrial settlement agreement and stipulated judgment to which it was not a party.” *Id.* at 437. The court stated, however, “we decline to hold that pretrial stipulated judgments are per se unenforceable under **Bashor**,” *id.* at 433, concluding that enforceability depends upon the circumstances of each case.

15. In **Nunn**, 244 P.3d at 117, the supreme court held that, for purposes of summary judgment, pretrial entry of a stipulated judgment in excess of policy limits against an insured established actual damages sufficient to support a claim in an assigned action against the liability insurer for bad-faith failure to settle a third-party claim within the policy limits. The insured's nonpayment of the judgment and receipt of a covenant not to execute on that judgment did not negate the damages element of the bad-faith claim. The court rejected the "prepayment rule" on which the lower court relied as inconsistent with **Bashor** and **Old Republic** and adopted the majority "judgment rule." However, because it recognized that pretrial stipulated judgments present concerns of fraud or collusion, the court also held that a confessed judgment will not be binding on an insurer until after the insurer is allowed to defend itself in an adversarial proceeding before a neutral fact finder.

16. The logic of **Nunn** applies to a claim against an insurance broker for failure to obtain appropriate coverage or inform the insured that its policy would not cover a risk for which coverage was sought. **DC-10 Entm't, LLC v. Manor Ins. Agency, Inc.**, 2013 COA 14, ¶ 14, 308 P.3d 1223. In that case, the insurer of a nightclub denied coverage for a fight between patrons based on an exclusion for assault and battery. The injured patron and the club entered into a pre-judgment assignment of proceeds agreement with damages to be determined by an arbitration judge. The trial court dismissed the case for lack of damages due to the absence of an enforceable judgment. The court of appeals reversed, concluding that, from the perspective of an insured, there was no practical difference between an insurer and a broker when expected coverage was denied and found, as a matter of first impression, that the assignment was valid.

### **Failure of Conditions**

17. An insured's failure to provide a liability insurer with notice of a claim before settlement with a third party will forfeit coverage based on a presumption of prejudice to the insurer unless the insured rebuts the presumption and the insurer is unable to prove actual prejudice to its interests from lack of notice. **Friedland v. Travelers Indem. Co.**, 105 P.3d 639 (Colo. 2005) (overruling **Marez v. Dairyland Ins. Co.**, 638 P.2d 286 (Colo. 1981) (holding that insured's unexcused failures to provide liability insurer with timely notice of accident and to forward suit papers forfeited coverage without insurer's need to show prejudice)).

18. The supreme court held that an insured's violation of a policy's no-voluntary-payments clause by settling with a claimant without suit and without advance notice to or the consent of its liability insurer bars coverage. **Travelers Prop. Cas. Co. of Am. v. Stresscon Corp.**, 2016 CO 22M, ¶¶ 13–15, 370 P.3d 140. The court, refusing to apply the notice-prejudice rule, held that a no-voluntary-payments clause, like the notice provision in a claims-made policy, see **Craft v. Philadelphia Indem.**

**Ins. Co.**, 2015 CO 11, 343 P.3d 951, is a fundamental term of the contract that defines the scope of the policy's coverage, and monies voluntarily paid to avoid suit are outside the scope of that coverage. **Stresscon**, ¶ 12.

19. The court of appeals applied the notice-prejudice rule to violation of an occurrence policy clause requiring notice of incidents within 60 days of their occurrence. **MarkWest Energy Partners, L.P. v. Zurich Am. Ins. Co.**, 2016 COA 110, ¶ 31, 411 P.3d 1080. In doing so, the court distinguished **Stresscon**, 2016 CO 22M, and **Craft**, 2015 CO 11, as dealing with policy terms that defined the scope of coverage. **MarkWest Energy Partners**, ¶¶ 24–26. Even though the 60-day notice provision was phrased as a condition precedent to coverage, the court stated that the purpose of the notice provision—avoidance of prejudice—is lacking if the insurer is unable to show prejudice from a failure to give required notice. *Id.* at ¶¶ 29–30.

## 25:2 ELEMENTS OF LIABILITY—FIRST-PARTY COMMON-LAW CLAIMS

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of bad faith breach of insurance contract, you must find all the following have been proved by a preponderance of the evidence:

1. The plaintiff had (injuries) (damages) (losses);
2. The defendant acted unreasonably in (*insert appropriate description, e.g., "denying payment of the plaintiff's claim"*);
3. The defendant knew that its (conduct) (position) was unreasonable or the defendant recklessly disregarded the fact that (his) (her) (its) (conduct) (position) was unreasonable; and
4. The defendant's unreasonable (conduct) (position) was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have)

been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. This instruction should be used for common-law first-party claims when an insured brings a direct action for policy benefits against the insurer. **Travelers Ins. Co. v. Savio**, 706 P.2d 1258 (Colo. 1985); *see also* **Goodson v. Am. Standard Ins. Co.**, 89 P.3d 409, 414 (Colo. 2004) (“First-party bad faith cases involve an insurance company refusing to make or delaying payments owed directly to its insured under a first-party policy such as life, health, disability, property, fire, or no-fault auto insurance.”).

2. Appropriate instructions defining the terms used in this instruction must also be given. **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995) (failure to define standard of care in terms of reasonableness was reversible error); *see* Instruction 25:3 (defining “unreasonable conduct” and “unreasonable position”); Instruction 25:7 (defining “reckless disregard”); *see also* Instructions 9:18—9:21 (relating to causation). Instruction 25:6 may also be given with this instruction.

3. In first-party, common-law claims, in contrast to third-party claims covered under Instruction 25:1, the insurer must not only have acted unreasonably, but must also have known or have recklessly disregarded the fact that its conduct was unreasonable. *See* **Am. Family Mut. Ins. Co. v. Allen**, 102 P.3d 333 (Colo. 2004).

4. Certain first-party claimants may also seek statutory remedies pursuant to sections 10-3-1115 and 10-3-1116, C.R.S., which have a lesser burden of proof, requiring that the insurer’s denial of or delay in paying an insurance claim was unreasonable (“without a reasonable basis”). *See* Instruction 25:4 and its Notes on Use.

5. This instruction, appropriately modified, is also applicable to a claim by an obligee against its surety for a bad faith breach of a surety contract. **Transamerica Premier Ins. Co. v. Brighton Sch. Dist. 27J**, 940 P.2d 348 (Colo. 1997); **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003).

6. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, *see* the Notes on Use to Instruction 4:20 (model unified verdict form).

### Source and Authority

1. This instruction is supported by **Savio**, 706 P.2d at 1274–75, and section 10-3-1113(3), C.R.S. *See also* **Brodeur v. Am. Home Assur. Co.**, 169 P.3d 139 (Colo. 2007); **Pham v. State Farm Mut. Auto. Ins. Co.**, 70 P.3d 567 (Colo. App. 2003); **Hyden v. Farmers Ins. Exch.**, 20

P.3d 1222 (Colo. App. 2000); **Novell v. Am. Guar. & Liab. Ins. Co.**, 15 P.3d 775 (Colo. App. 1999); **Munoz v. State Farm Mut. Auto. Ins. Co.**, 968 P.2d 126 (Colo. App. 1998); **Herod v. Colo. Farm Bureau Mut. Ins. Co.**, 928 P.2d 834 (Colo. App. 1996); **South Park Aggregates, Inc. v. Nw. Nat'l Ins. Co.**, 847 P.2d 218 (Colo. App. 1992); **Burgess v. Mid-Century Ins. Co.**, 841 P.2d 325 (Colo. App. 1992); **Martin v. Principal Cas. Ins. Co.**, 835 P.2d 505 (Colo. App. 1991), *rev'd on other grounds sub nom. Budget Rent-A-Car Corp. v. Martin*, 855 P.2d 1377 (Colo. 1993); **Pierce v. Capitol Life Ins. Co.**, 806 P.2d 388 (Colo. App. 1990); **Southerland v. Argonaut Ins. Co.**, 794 P.2d 1102 (Colo. App. 1990); **Bucholtz v. Safeco Ins. Co. of Am.**, 773 P.2d 590 (Colo. App. 1988); **Bolz v. Sec. Mut. Life Ins. Co.**, 721 P.2d 1216 (Colo. App. 1986).

2. The 1991 amendment to section 8-43-304(1), C.R.S., did not abrogate the common-law tort of bad faith breach of insurance contract in the context of a workers' compensation claim. **Vaughan v. McMinn**, 945 P.2d 404 (Colo. 1997); *accord Brodeur*, 169 P.3d at 147.

3. An insurer's decision to deny benefits must be evaluated according to the information it had before it at the time of the denial. **Schultz v. GEICO Cas. Co.**, 2018 CO 87, ¶ 28, 429 P.3d 844, 849 (original proceeding striking the trial court's order allowing a post-ligation C.R.C.P. 35 examination as an attempt "to create new evidence to justify a previous benefits decision"); **Peiffer v. State Farm Mut. Auto. Ins. Co.**, 940 P.2d 967 (Colo. App. 1996), *aff'd*, 955 P.2d 1008 (Colo. 1998).

4. An insurer's duty of good faith and fair dealing "extends to the advertisement and purchase" of its insurance policies. **Estate of Casper v. Guar. Tr. Life Ins. Co.**, 2016 COA 167, ¶ 74, 421 P.3d 1184 (citing **Ballow v. PHICO Ins. Co.**, 875 P.2d 1354 (Colo. 1993)), *aff'd in part, rev'd in part on other grounds*, 2018 CO 43, 418 P.3d 1163. The court of appeals affirmed the trial court's giving of an instruction based on Insurance Regulation 4-2-3 governing industry advertising as valid, but not conclusive, evidence of insurer bad faith based on the conduct of the insurer's producers (the claims against whom settled prior to trial) in misrepresenting the nature of the policy purchased by plaintiff. *Id.* at ¶ 77.

5. Both a self-insured employer under the Workers' Compensation Act and an independent insurance adjuster acting on behalf of a self-insured employer owe a duty of good faith and fair dealing to an employee asserting a worker's compensation claim. **Scott Wetzel Servs., Inc. v. Johnson**, 821 P.2d 804 (Colo. 1991). A third-party administrator that makes benefit determinations, assumes some of the insured risk, and undertakes many of the insurer's obligations with the power, motive, and opportunity to act unscrupulously in handling claims has a special relationship with insureds from which liability for bad faith breach of insurance contract may arise despite lack of contractual privity with the insureds. **Cary v. United of Omaha Life Ins. Co.**, 68 P.3d 462 (Colo. 2003) (third-party administrator of city's health insur-

ance plan owed duty of good faith to persons insured under plan); see also **Compton v. Safeway, Inc.**, 169 P.3d 135, 137 (Colo. 2007) (entity that self-insures through captive insurance company “functions like a traditional insurance company”). But see **Riccatone v. Colo. Choice Health Plans**, 2013 COA 133, ¶ 45, 315 P.3d 203 (holding, without addressing the foregoing authorities, that third-party administrator and plan advisor may not be held liable for common law first-party bad faith).

6. Plaintiff, awarded damages for breach of contract, common law and statutory bad faith, and punitive damages, died after the verdicts were rendered but before final judgment, the entry of which had to await determination of section 10-3-1116(1) attorney fees and court costs and calculation of prejudgment interest and allowable punitive damages. **Estate of Casper**, 2016 COA 167, ¶¶ 7–14. Decedent’s estate was substituted as plaintiff, and insurer moved under the survival of claims statute to set aside the verdict and limit damages to the breach of contract award. The trial court denied the motion, finding that because the plaintiff was alive when the verdict entered, the claims were not abated. After determining the total amount of actual damages, including prejudgment interest, the court reduced the punitive damage award to the amount of actual damages and entered final judgment nunc pro tunc to the verdict date. The supreme court affirmed the denial of the insurer’s motion, holding that the jury awards of noneconomic and punitive damages did not abate but reversed entry of judgment nunc pro tunc. **Guar. Tr. Life Ins. Co. v. Estate of Casper**, 2018 CO 43, ¶¶ 26–27, 418 P.3d 1163.

7. A UM/UIM claimant may recover section 13-21-101(a), C.R.S., prejudgment interest on benefits due only if all following elements are satisfied: (a) suit is filed for recovery of benefits; (b) prejudgment interest on damages is claimed in the complaint; (c) damages are awarded by the fact finder; and (d) final judgment is entered. **Munoz v. Am. Family Mut. Ins. Co.**, 2018 CO 68, ¶ 20, 425 P.3d 1128 (prejudgment interest does not apply to claims resolved by settlement).

8. An employee injured in the scope of employment while a passenger in a vehicle driven by a co-employee and owned by another co-employee is barred from asserting a UM/UIM claim on the owner’s policy benefits “because he is not ‘legally entitled to recover damages’ from [the driver] by virtue of the co-employee immunity rule.” **Ryser v. Shelter Mut. Ins. Co.**, 2019 COA 88, ¶ 37 (*cert. granted* Apr. 13, 2020). Employer and co-employee immunity from suit by fellow employees under Colorado’s Workers’ Compensation Act is not a bar to an injured employee’s claim for UM/UIM insurance benefits on the employee’s personal policy in excess of benefits due under the Act for damages caused by an at-fault co-employee driver. **Am. Family Mut. Auto. Ins. Co. v. Ashour**, 2017 COA 67, ¶¶ 66–73, 410 P.3d 753 (interpreting the phrase “legally entitled to recover” in section 10-4-609, C.R.S., to require only proof of tortfeasor fault and extent of damages to further the purposes of the UM/UIM statute).

9. A UIM policy provision requiring exhaustion of the at-fault driver's liability coverage as a condition precedent to UIM coverage is void and unenforceable. **Tubbs v. Farmers Ins. Exch.**, 2015 COA 70, ¶ 11, 353 P.3d 924 (UIM insurer is liable for damages in excess of the tortfeasor's liability limit regardless of whether the UIM insured exhausted or recovered any amount from the at-fault driver); see **Fisher v. State Farm Mut. Auto. Ins. Co.**, 2015 COA 57, ¶¶ 19–20, 419 P.3d 985 (same), *aff'd on other grounds*, 2018 CO 39, 418 P.3d 501.

10. A UM/UIM insurer does not “step into the shoes” of the at-fault tortfeasor on the issue of liability. **State Farm Mut. Auto. Ins. Co. v. Brekke**, 105 P.3d 177 (Colo. 2004); **Parsons ex rel. Parsons v. Allstate Ins. Co.**, 165 P.3d 809 (Colo. App. 2006). A claim for bad faith failure to pay UM/UIM benefits is a first-party cause of action. **Brekke**, 105 P.3d at 188–89. “[A] bad faith claim for nonpayment of UIM benefits cannot accrue until the insured has obtained a judgment against or . . . settled with the underinsured driver.” **Cork v. Sentry Ins.**, 194 P.3d 422, 428 (Colo. App. 2008); accord **Sanderson v. Am. Family Mut. Ins. Co.**, 251 P.3d 1213 (Colo. App. 2010).

11. In **Clementi v. Nationwide Mut. Fire Ins. Co.**, 16 P.3d 223 (Colo. 2001), the supreme court adopted the notice-prejudice rule in the context of UIM claims; where notice is untimely, insurer has the burden to prove by a preponderance that it was prejudiced by the delay. See also **Lauric v. USAA Cas. Ins. Co.**, 209 P.3d 190 (Colo. App. 2009) (applying notice-prejudice rule to violation of notice and “consent-to-settle” clauses in UM/UIM policies, and holding that a settlement in breach of such clauses gives rise to a rebuttable presumption that the insurer was prejudiced).

12. Nothing in the language of section 10-4-109, C.R.S., prevents an agent of a named insured from exercising either implied or apparent authority to reject UM/UIM coverage on behalf of its principal, and one named insured may effectively reject that coverage on behalf of another named or additional insured. **State Farm Mut. Auto. Ins. Co. v. Johnson**, 2017 CO 68, ¶¶ 18, 24, 396 P.3d 651.

13. Section 10-4-517, C.R.S., immunizes the Colorado Insurance Guaranty Association from liability for bad faith breach of insurance contract. **Mosley v. Indus. Claim Appeals Office**, 119 P.3d 576 (Colo. App. 2005).

14. A private insurance company acting in an independent-contractor capacity as a third-party administrator of retirement disability claims for the Public Employees Retirement Association, an instrumentality of the state, is not protected by governmental immunity. **Moran v. Standard Ins. Co.**, 187 P.3d 1162 (Colo. App. 2008). A bad faith claim against a self-insured municipality is barred by governmental immunity, but an independent adjusting company acting on behalf of the municipality may be sued for bad faith. **Jordan v. City of Aurora**, 876 P.2d 38 (Colo. App. 1993). A nonprofit intermediary formed by pub-

lic entities to provide insurance services to an immune self-insurance pool, on the other hand, is immune from liability as an “instrumentality” of a public entity and as a separate entity created by intergovernmental cooperation. **Colo. Special Dists. Prop. & Liab. Pool v. Lyons**, 2012 COA 18, ¶ 45, 277 P.3d 874 (third-party case).

15. A claim for bad faith breach of insurance contract is a tort and is, therefore, barred under section 13-80-102, C.R.S., unless brought within two years after the date on which both the injury and the cause of the injury are known or, through the exercise of reasonable diligence, should have been known. **Brodeur**, 169 P.3d at 147 & n.8 (noting that “injury” and “damage” are not synonymous; damage flows from injury and need not be known before a claim can accrue); *see also* **Olson v. State Farm Mut. Auto. Ins. Co.**, 174 P.3d 849 (Colo. App. 2007) (UM insurer has no quasi-fiduciary relationship to insured and has no duty to advise the insured when a statute of limitations will run); **Daugherty v. Allstate Ins. Co.**, 55 P.3d 224 (Colo. App. 2002) (duty to act in good faith and deal fairly with the insured is not triggered until some contractual duty imposed by the contract arises) (third-party case); **Harmon v. Fred S. James & Co.**, 899 P.2d 258 (Colo. App. 1994).

16. A bad faith claim in tort arising out of the handling of a workers’ compensation claim and a claim for remedies available under the Workers’ Compensation Act are separate and independent actions, and accrual of the tort claim is not dependent on final resolution of the workers’ compensation claim. **Brodeur**, 169 P.3d at 149 (affirming dismissal of bad faith claim as time-barred before final adjudication of independent administrative claim; accrual of tort claim was not equitably tolled by the workers’ compensation proceeding).

17. A tort claim for bad faith breach of insurance contract does not arise under the contract of insurance, and therefore, such a claim is not subject to time limits for filing suit that are contained in the policy. **Dupre v. Allstate Ins. Co.**, 62 P.3d 1024 (Colo. App. 2002); **Daugherty**, 55 P.3d at 228; **Emenyonu v. State Farm Fire & Cas. Co.**, 885 P.2d 320 (Colo. App. 1994); **Flickinger v. Ninth Dist. Prod. Credit Ass’n**, 824 P.2d 19 (Colo. App. 1991); **Coleman v. United Fire & Cas. Co.**, 767 P.2d 761 (Colo. App. 1988).

18. Unlike arbitration, participation in a policy appraisal process to determine value of a property loss does not entitle either the insured or the insurer to a judgment or immunize the insurer from bad faith claims. **Andres Trucking Co. v. United Fire & Cas. Co.**, 2018 COA 144, ¶¶ 17–25 (affirming finding that the appraisal award was final but reversing judgment for insurer on insured’s breach and statutory bad faith claims related to property loss).

19. An arbitration panel’s finding that an insurer’s refusal to pay insurance benefits was not willful and wanton does not preclude the tort claim of bad faith when the latter is based upon additional evidence

of misconduct that could not have been presented to the panel. **Dale v. Guar. Nat'l Ins. Co.**, 948 P.2d 545 (Colo. 1997) (overruling **Leahy v. Guar. Nat'l Ins. Co.**, 907 P.2d 697 (Colo. App. 1995)). However, if the separate claims are based on the same conduct and evidence of that conduct was available for presentation at the time of arbitration, a panel's determination that there was no willful and wanton conduct may preclude a tort claim for bad faith if all collateral estoppel elements are proven. **Guar. Nat'l Ins. Co. v. Williams**, 982 P.2d 306 (Colo. 1999).

20. The post-litigation conduct of an insurer in prosecuting or defending claims involving its insured may or may not be admissible at trial as evidence of bad faith. In **American Family Insurance Co. v. Bowser**, 779 P.2d 1376 (Colo. App. 1989), the court of appeals observed that denial of a claim by filing a declaratory judgment action against an insured without an adequate investigation may constitute bad faith. In **Tozer v. Scott Wetzel Services, Inc.**, 883 P.2d 496 (Colo. App. 1994), the court held that the reasonableness of an insurer's decision to appeal an administrative law judge's decision presented an issue for the trial court to determine. *See also Jimenez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003) (record supported ALJ's finding that a failure to brief benefits issue was not necessarily indicative of bad faith appeal); *cf. Brandon v. Sterling Colo. Beef Co.*, 827 P.2d 559 (Colo. App. 1991) (expert opinion testimony that an ALJ's decision would be difficult to challenge successfully on appeal held insufficient to show that insurer's decision to appeal was bad faith). A division of the court of appeals confined **Tozer** to its workers' compensation context and held that the "lack of substantial justification" standard set forth in the attorney fees statute, §§ 13-17-101 to -106, C.R.S., unduly limits the definition of "unreasonableness" for purposes of insurance bad faith. **Am. Guar. & Liab. Co. v. King**, 97 P.3d 161, 168 (Colo. App. 2003) (affirming trial court's finding of bad faith against workers' compensation insurer for its maintenance of subrogation claim against injured worker to recover money he received in settlement of medical malpractice case).

21. An insurer's post-litigation conduct may be considered by the court in post-trial proceedings for purposes of determining whether an award of punitive damages should be modified. *See Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59 (Colo. 2005) (authorizing trebling of punitive damages award based on defendant's behavior during pendency of case); **Tait v. Hartford Underwriters Ins. Co.**, 49 P.3d 337 (Colo. App. 2001) (affirming trial court's increase of punitive damage award based on insurer's litigation conduct).

22. An insured cannot recover for bad faith breach of insurance contract if the insurance company has grounds to rescind the contract on the basis of the insured's fraudulent misrepresentations on the application for insurance. **Abdelsamed v. N.Y. Life Ins. Co.**, 857 P.2d 421 (Colo. App. 1992), *rev'd on other grounds sub nom. Hock v. N.Y. Life Ins. Co.*, 876 P.2d 1242 (Colo. 1994).

23. An insured's failure to submit to a medical examination

requested by the insurer, as required by the policy, does not preclude liability of the insurer for bad faith breach of insurance based on conduct that occurred before that request. **Hansen v. State Farm Mut. Auto. Ins. Co.**, 936 P.2d 584 (Colo. App. 1996), *rev'd on other grounds*, 957 P.2d 1380 (Colo. 1998).

24. “[T]he duty of good faith owed by the insurer to the insured requires that it not act to prevent the occurrence of conditions to its performance.” **Dupre v. Allstate Ins. Co.**, 62 P.3d 1024, 1028 (Colo. App. 2002) (summary judgment for insurer reversed where issue existed as to whether insurer was equitably estopped from relying on insured’s failure to fulfill a condition as defense to claim).

25. To rely on an insured’s prejudicial noncooperation to avoid coverage, an insurer must plead noncooperation, whether as an affirmative defense or failure of a condition precedent, with particularity as required by C.R.C.P. 9(c). **Soicher v. State Farm Mut. Auto. Ins. Co.**, 2015 COA 46, ¶¶ 25–30, 351 P.3d 559 (an insurer’s denial of an insured’s allegation that all obligations of the insurance contract have been satisfied is insufficient to put an insured on notice of a noncooperation defense).

26. An insured’s duty of good faith and fair dealing is broader than a contractual duty to cooperate, but the consequences of breaching those duties are not necessarily the same. While proof of prejudicial noncooperation may bar a claim for policy benefits, a violation of the implied covenant may not, and an insurer’s assertion of a bad faith defense is insufficient notice of “a contract-voiding noncooperation defense. . . .” *Id.* at ¶¶ 26–27.

27. **Parsons**, 165 P.3d at 814–18, discussed the differing concerns of litigation conduct depending upon whether the conduct was that of the insurer or the insurer’s attorney and whether that evidence is heard by a jury or after trial by the court. The **Parsons** Division adopted the following test for determination of whether attorney litigation conduct may be introduced as evidence of bad faith in a jury trial: “[E]vidence of an attorney’s post-filing litigation conduct may be admitted if the risks of unfair prejudice, confusion of the issues, or misleading the jury, and considerations of undue delay, waste of time, or the presentation of unnecessary cumulative evidence are substantially outweighed by the probative value of the evidence.” *Id.* at 818. Applying this test, the **Parsons** Division affirmed the trial court’s exclusion of attorney post-filing conduct tendered as evidence of bad faith where the probative value was light and “the dangers of unfair prejudice, misleading the jury, and confusing the issues were significant.” *Id.* at 819.

28. An insured may maintain claims for both bad faith breach of insurance contract and outrageous conduct arising from the mishandling of a claim for insurance benefits. **McKelvy v. Liberty Mut. Ins. Co.**,

983 P.2d 42 (Colo. App. 1998). In a first-party case, a finding of fact that an insurer's conduct was outrageous necessarily implies that the conduct was willful and wanton within the meaning of section 10-4-708(1.8), C.R.S. (now repealed), and in bad faith as defined in this instruction. **Munoz v. State Farm Mut. Auto. Ins. Co.**, 968 P.2d 126 (Colo. App. 1998).

29. The Colorado Auto Accident Reparations Act (now repealed) does not preempt the common-law tort claim of bad faith breach of insurance contract. **Farmers Group, Inc. v. Williams**, 805 P.2d 419 (Colo. 1991).

### **ERISA Preemption**

30. A claim for bad faith breach of insurance contract may be preempted in cases involving insurance provided by an employer. The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 to -03 (2018) (ERISA), preempts state-law claims that “relate to” an employee benefit plan except for those state laws that are considered to “regulate” insurance. **Aetna Health Inc. v. Davila**, 542 U.S. 200, 217–18 (2004) (“[E]ven a state law that can arguably be characterized as ‘regulating insurance’ will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA’s remedial scheme.”); **Rush Prudential HMO, Inc. v. Moran**, 536 U.S. 355 (2002) (state statute permitting independent medical review of HMO’s denial of health insurance benefits for lack of medical necessity regulated insurance and was not preempted where relief sought was available under ERISA); **UNUM Life Ins. Co. v. Ward**, 526 U.S. 358 (1999) (state notice-prejudice rule applicable only to insurance contracts did “regulate” insurance and, thus, was saved from preemption); **Pilot Life Ins. Co. v. Dedeaux**, 481 U.S. 41 (1987) (state bad faith law that applied to breach of any contract did not “regulate” insurance and was, therefore, preempted); **Pegram v. Herdrich**, 530 U.S. 211 (2000) (in context of physician-owned-and-operated HMO, plan beneficiary’s claim for medical malpractice arising from treating physician’s decision as to eligibility for coverage that was inextricably mixed with treatment decision was held not preempted).

31. ERISA and its regulations must be consulted because certain employer group benefit plans are specifically excluded from ERISA in its Safe Harbor provision. *See* 29 U.S.C. § 1003 (b) (2018); 29 C.F.R. § 2510.3-1(j) (2017) (listing factors to be considered).

32. For a discussion of factors to be considered in determining whether ERISA applies, see **Peters v. Boulder Ins. Agency, Inc.**, 829 P.2d 429 (Colo. App. 1991) (employer’s purchase of insurance does not alone establish an ERISA plan); **Pierce v. Capitol Life Ins. Co.**, 806 P.2d 388 (Colo. App. 1990) (bad faith claim of business owners/insureds not preempted where plaintiffs were not plan “participants” or “beneficiaries” entitled to bring ERISA claim). State courts have limited concurrent jurisdiction with federal courts over ERISA actions. **Estate of Damon**, 915 P.2d 1301 (Colo. 1996).

33. Even though a state law may “regulate insurance” within the meaning of ERISA’s Savings Clause, it will be barred by conflict preemption if the law provides for remedies unavailable under ERISA. In **Timm v. Prudential Insurance Co. of America**, 259 P.3d 521 (Colo. App. 2011), the court determined that section 10-3-1116(1), C.R.S., which provides for double recovery of benefits that are unreasonably delayed or denied, was preempted because the statutory cause of action allowed recovery of benefits that are not available under and therefore conflict with ERISA. *See also* § 10-3-1116(2), (3).

## 25:3 UNREASONABLE CONDUCT/UNREASONABLE POSITION—COMMON-LAW CLAIMS—DEFINED

“Unreasonable conduct” means the failure to do an act that a reasonably careful insurance company would do, or the doing of an act that a reasonably careful insurance company would not do, under the same or similar circumstances, to protect the persons insured from [injuries] [damages] [losses].)

“Unreasonable position” means a position taken by an insurance company with respect to a claim being made on one of its policies that a reasonably careful insurance company would not take under the same or similar circumstances.)

### Notes on Use

1. This instruction should be used in conjunction with Instruction 25:1 or 25:2 whenever the second numbered paragraph of either of those instructions is given, and in appropriate cases, Instruction 25:6 should be used, as well.

2. If appropriate, an alternative phrase to “insurance company” (e.g., “self-insurer,” “person,” “independent insurance adjuster”) should be used to describe the defendant.

### Source and Authority

1. This instruction is supported by **Travelers Insurance Co. v. Savio**, 706 P.2d 1258 (Colo. 1985); **Farmers Group, Inc. v. Trimble**, 691 P.2d 1138 (Colo. 1984); **Bankruptcy Estate of Morris v. COPIC Insurance Co.**, 192 P.3d 519 (Colo. App. 2008); **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995); and **Pierce v. Capitol Life Insurance Co.**, 806 P.2d 388 (Colo. App. 1990).

2. The reasonableness of the insurer’s conduct is to be determined objectively, according to industry standards. **Am. Family Mut. Ins. Co. v. Allen**, 102 P.3d 333 (Colo. 2004); **Goodson v. Am. Std. Ins. Co.**, 89 P.3d 409 (Colo. 2004); **Savio**, 706 P.2d at 1275. If the industry standard at issue is one that is within the common knowledge and experience of ordinary people, expert testimony is not required to establish those standards. **Allen**, 102 P.3d at 343 (reasonableness of insurer’s investigation into underlying events of automobile insurance claim was not technical question and did not require additional professional training beyond knowledge of average juror, nor did determination of what con-

stitutes reasonable explanation for denying claim); **Surdyka v. DeWitt**, 784 P.2d 819, 822 (Colo. App. 1989) (if the “standard of care involves questions beyond that competence of ordinary persons, expert testimony may be required,” but not if the standard is within “the knowledge and experience of the average juror”); *see also* Instruction 25:6, Source and Authority ¶ 2. An affidavit of an insurance expert that simply states conclusory opinions cannot create an issue of material fact to avoid summary judgment. **Zolman v. Pinnacol Assur.**, 261 P.3d 490 (Colo. App. 2011) (expert affidavit did not preclude summary judgment for insurer on issue of fair debatability).

3. An insurer’s implied duty of good faith and fair dealing extends to the advertisement, marketing, and purchase of insurance policies, and whether the insurer breached this duty is determined objectively based on industry standards, including administrative rules and regulations, which may assist in establishing those standards. **Estate of Casper v. Guar. Tr. Life Ins. Co.**, 2016 COA 167, ¶¶ 74, 76, 421 P.3d 1184, 1198 (approving an instruction containing excerpts from an insurance regulation governing the advertising and sale of defendant’s policy that stated the “regulations are valid, but not conclusive evidence of insurance industry standards”), *aff’d in part, rev’d in part on other grounds*, 2018 CO 43, 418 P.3d 1163.

4. A claim based upon the unreasonable conduct of an insurance carrier arises at the time that conduct occurs. **Bernhard v. Farmers Ins. Exch.**, 885 P.2d 265 (Colo. App. 1994), *aff’d on other grounds*, 915 P.2d 1285 (Colo. 1996). The fact that an insurer ultimately pays the covered benefit due does not “cure” pre-payment unreasonable conduct. **Goodson**, 89 P.3d at 414 (citing **Trimble**, 691 P.2d at 1142).

5. “Unreasonable conduct” may occur before, during, or after trial. **Bankr. Estate of Morris**, 192 P.3d 524–25 (discussing factors to be considered in assessing whether liability insurer failed to protect its insured by settling a third-party claim before or during trial and after excess judgment entered against its insured). “Each bad faith act constitutes a separate and distinct tortious act, on which the statute of limitation begins to run anew when the plaintiff becomes aware of the injury and its cause.” **Cork v. Sentry Ins.**, 194 P.3d 422, 427 (Colo. App. 2008).

6. In claims arising under sections 10-3-1115 and -1116, C.R.S., “fair debatability,” alone, cannot establish that an insurer’s delay or denial in paying a covered benefit was reasonable, as a matter of law. **Vaccaro v. Am. Family Ins. Grp.**, 2012 COA 9M, ¶¶ 42–44, 275 P.3d 750. First party claims that are “fairly debatable” are subject to challenge by an insurer, even if the decision to deny coverage ultimately turns out to be mistaken. **Savio**, 706 P.2d at 1275; **Schuessler v. Wolter**, 2012 COA 86, ¶ 37, 310 P.3d 151; **Zolman**, 261 P.3d at 497. “If an insurer does not know that its denial of a claim is unreasonable and does not act with reckless disregard of a valid claim, the insurer’s conduct would be based upon a permissible, albeit mistaken, belief that

the claim is not compensable.” **Pham v. State Farm Mut. Auto. Ins. Co.**, 70 P.3d 567, 572 (Colo. App. 2003) (affirming summary judgment for uninsured motorist insurer on claims for bad faith and willful and wanton tortious breach of contract where coverage issues were complicated, debatable, undecided under state law, and reliance on statutory language and existing case law was reasonable). “[A]n insurer will be found to have acted in bad faith only if it has intentionally denied, failed to process, or failed to pay a claim without a reasonable basis.” **Zolman**, 261 P.3d at 497 (affirming summary judgment for workers’ compensation insurer and holding that various bases existed to support reasonableness of insurer’s denial of claimant’s requests for change of physician and additional treatment).

7. That a claim is “fairly debatable” weighs against a finding of bad faith; however, without more, this factor is not outcome-determinative and, thus, is not “necessarily sufficient to defeat a bad faith claim as a matter of law.” **Sanderson v. Am. Family Mut. Ins. Co.**, 251 P.3d 1213, 1217 (Colo. App. 2010) (disagreeing with trial court’s conclusion that the presence of a “fairly debatable” issue, alone, justified summary judgment for insurer as a matter of law, but applying that standard to affirm the judgment below); *accord* **Schuessler**, 2012 COA 86, ¶ 38.

8. If an insurer lacks a “reasonable basis” to deny a claim, the claim is not “fairly debatable.” **Geiger v. Am. Std. Ins. Co.**, 192 P.3d 480 (Colo. App. 2008) (citing **Savio**, 706 P.2d at 1275). Where an insurance policy clearly and unambiguously defines an insured’s rights, an insurer may not disregard the plain meaning of contract terms, read additional “common sense” terms into the policy, or claim that an interpretation of an unambiguous terms is a “novel” theory of coverage to create a “fairly debatable” issue defense. *Id.* at 484. Likewise, a trial court’s ruling that disregards the plain meaning of the insurance policy and controlling rules of law cannot create a “fairly debatable” issue as to coverage. *Id.*

## 25:4 ELEMENTS OF LIABILITY—FIRST-PARTY STATUTORY CLAIMS

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of unreasonable (denial of) (delay in) payment of benefits, you must find all the following have been proved by a preponderance of the evidence:

1. The defendant (denied) (delayed) payment of benefits to the plaintiff; and
2. The defendant's (denial) (delay) of payment was without a reasonable basis.

If you find that either of these statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that both statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. If this instruction is given, then Instruction 25:10 must also be given.
2. If there are multiple claims, see section 10-3-1116(4), C.R.S.

3. Use whichever parenthesized portions of the instruction are appropriate.

4. If there are affirmative defenses, additional instructions should be given.

5. Sections 10-3-1115 and -1116, C.R.S., provide an insured whose claim for insurance benefits has been unreasonably delayed or denied a private right of action in addition to and separate from a common-law claim for first-party bad faith breach of insurance contract. **Kisselman v. Am. Family Mut. Ins. Co.**, 292 P.3d 964 (Colo. App. 2011). Unlike the common-law first-party claim recognized in **Travelers Insurance Co. v. Savio**, 706 P.2d 1258 (Colo. 1985), which requires proof of both unreasonable conduct and knowing or reckless disregard of unreasonableness, liability under this statutory claim requires only proof that the insurer acted unreasonably in delaying or denying payment (defined as “without a reasonable basis”); knowing or reckless disregard of unreasonableness need not be shown.

6. The statutory definition of “first-party claimant” set forth in section 10-3-1115(1)(b)(I), C.R.S., includes entities that assert an entitlement to benefits “on behalf of an insured,” and is not limited to consumer insureds or their subrogee. In **Kyle W. Larson Enters., Inc. v. Allstate Ins. Co.**, 2012 COA 160M, ¶ 1, 305 P.3d 409, the court held that a roofing contractor that was accorded full authority by the insured to deal with the insurer on a roof damage claim was a “first-party claimant” entitled to bring an action under sections 10-3-1115 and -1116.

### Source and Authority

1. This instruction is supported by sections 10-3-1115 and -1116; **Hansen v. American Family Mutual Insurance Co.**, 2013 COA 173, ¶¶ 46–48, 383 P.3d 28, *rev'd on other grounds*, 2016 CO 46, 375 P.3d 115; **Hall v. American Standard Insurance Co.**, 2012 COA 201, ¶ 17, 292 P.3d 1196; and **Kisselman**, 292 P.3d at 972–73.

2. “[T]he ‘fairly debatable’ issue is not relevant to a statutory delay claim pursuant to section 10-3-1116.” **Nibert v. GEICO Cas. Co.**, 2017 COA 23, ¶ 15 (agreeing with cases limiting relevancy of the fair debatability concept to first-party common law bad faith claims).

3. An insured’s lack of cooperation may be considered by the jury in determining whether an insurer’s delay in payment was reasonable. **Fisher v. State Farm Mut. Auto. Ins. Co.**, 2015 COA 57, ¶ 42, 419 P.3d 985, *aff'd on other grounds*, 2018 CO 39, 418 P.3d 501.

4. An insurer’s unreasonable delay or denial of payment as to part of a UIM claim (medical expenses) may subject it to liability even though a reasonable dispute existed as to other components of the claim. **Fisher**, 2015 COA 47, ¶ 36 (insurance contract contained no requirement that insured establish all damages as a prerequisite to the insurer’s obliga-

tion to pay any damages, and any provision that did limit statutorily mandated UIM coverage would be unenforceable).

5. UIM benefits are owed to the extent that the insured's damages exceed the amount of the at-fault driver's liability limits up to the UIM limit of coverage, and the amount of damages the insured is entitled to collect from the underinsured driver need not be established as a condition to UIM coverage. **Fisher**, 2015 COA 47, ¶¶ 19 & 20.

6. Sections 10-3-1115 and -1116 apply prospectively to insurer conduct occurring after their August 5, 2008, effective date, even if the insured's original claim was made before that date. **Kisselman**, 292 P.3d at 976 (distinguishing Colorado's refusal to recognize continuing acts of bad faith as giving rise to new claims); see **Dale v. Guar. Nat'l Ins. Co.**, 948 P.2d 545 (Colo. 1997) (while ongoing bad faith is relevant to a common-law claim, it does not give rise to additional bad faith claims).

7. Conflict preemption precludes a claim under this statute brought in connection with a policy governed by ERISA because the double-benefit remedy provided by section 10-3-1116(1) supplements and therefore conflicts with remedies available under ERISA. **Timm v. Prudential Ins. Co. of Am.**, 259 P.3d 521 (Colo. App. 2011).

8. Insureds' entitlement to de novo judicial review and trial by jury under section 10-3-1116(3), C.R.S., is not subject to arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2018). **Meardon v. Freedom Life Ins. Co.**, 2018 COA 32, ¶¶ 15-20, 417 P.3d 929. The provisions of section 10-3-1116(3) incorporated into the insurance contract by the policy's conformity to state law provision invalidate a mandatory arbitration clause in a health insurance policy for claims within the ambit of the statute. *Id.*

## 25:5 UNREASONABLE DELAY OR DENIAL

**An insurer's delay or denial in authorizing payment of a covered benefit is unreasonable if that action is without a reasonable basis.**

### Notes on Use

This instruction relates to statutory claims provided by sections 10-3-1115 and -1116, C.R.S., and should be given with Instruction 25:4.

### Source and Authority

1. This instruction is supported by section 10-3-1115(2), which provides that an insurer's delay or denial in authorizing payment of a covered benefit is "unreasonable" if that conduct is without a reasonable basis. **Am. Family Mut. Ins. Co. v. Hansen**, 2016 CO 46, ¶ 32, 375 P.3d 115; **Fisher v. State Farm Mut. Auto. Ins. Co.**, 2015 COA 57, ¶¶ 53–54, 419 P.3d 985, *aff'd on other grounds*, 2018 CO 39, 418 P.3d 501; see § 10-3-1113(1), (4), C.R.S.; see also § 10-3-1104(1)(h)(I)–(XIV), C.R.S.

2. Section 10-3-1113(1) provides that an insurer acts in breach of its duty of good faith and fair dealing if it "delays or denies payment without a reasonable basis."

3. Expert testimony is not required to establish the standard of insurer unreasonableness under section 10-3-1115 when the insurer's conduct is determined by legislative enactment or when the standard is within the common knowledge and experience of ordinary people. **Fisher**, ¶¶ 15 & 54.

4. Exclusion of industry standard expert testimony that consisted of bare assertions and conclusory opinions that the insurer's conduct was consistent with industry standards, without description of those standards or how the insurer's conduct comported with those standards, was not so prejudicial as to require a new trial. **Fisher**, ¶ 60.

5. CRE 408 precludes admission of evidence of an insurer's refusal to pay the amount of a rejected initial offer to settle a UIM claim as proof of the amount of undisputed benefits owed. **Fisher**, ¶ 15.

6. "Whether the insurer has acted reasonably in denying or delaying approval of a claim will be determined on an objective basis, requiring proof of the standards of conduct in the industry." **Travelers Ins. Co. v. Savio**, 706 P.2d 1258, 1275 (Colo. 1985) (addressing first-party common-law claim).

7. The fact that a claim may be "fairly debatable" in the context of a first-party common law claim for bad faith does not establish, as a mat-

ter of law, that an insurer's delay or denial of benefits was reasonable under section 10-3-1115(2). **Vaccaro v. Am. Family Ins. Grp.**, 2012 COA 9M, ¶ 42, 275 P.3d 750 (citing **Sanderson v. Am. Family Mut. Ins. Co.**, 251 P.3d 1213, 1217 (Colo. App. 2010)).

8. In **Hansen**, 2016 CO 46, ¶ 32, the court held that an insurer's denial of a claim in reliance on an unambiguous insurance contract term was reasonable and could not establish liability under section 10-3-1115(2).

## 25:6 UNREASONABLE CONDUCT/UNREASONABLE POSITION—STATUTORY VIOLATIONS—DEFINED

**The statutes of Colorado prohibit an insurance company from willfully:** *(Insert from § 10-3-1104 (1)(h)(I) through (XIV), C.R.S., using separately numbered subparagraphs for each, a suitable description of any relevant “unfair claims settlement practice” of which there is sufficient evidence).*

**You may consider any such conduct in determining whether the defendant acted unreasonably in (denying) (or) (delaying) payment if you find that:**

- 1. The defendant (name) willfully engaged in such conduct;**
- 2. Such conduct caused or contributed to the defendant’s (denial) (or) (delay) of payment of the plaintiff’s insurance claim; and**
- 3. Such conduct caused or contributed to any of the plaintiff’s claimed (injuries) (damages) (losses).**

### Notes on Use

1. Under section 10-3-1113(4), C.R.S., this instruction should be used only in cases in which there is sufficient evidence of a willful violation of one or more subparagraphs (I) through (XIV) of section 10-3-1104(1)(h), C.R.S., Colorado’s version of the Unfair Claim Settlement Practices Act (UCSPA). This instruction does not apply, however, to violations of more recently added subparagraphs (XV) through (XVII) of section 10-3-1104(1)(h), because those subparagraphs are not included in the cross reference made in section 10-3-1113(4) to section 10-3-1104(1)(h)(I)–(XIV).

2. When this instruction is given, additional instructions should also be given, if necessary, defining any legal terms in any applicable subparagraph that might not otherwise be understandable to the jury.

3. Section 10-3-1113, which authorizes admission of evidence that the insurer violated section 10-3-1104(1)(h), refers only to the delay or denial of payment. Caselaw, however, has established that an insurer’s duties of good faith and fair dealing are broader than the obligation not to delay or withhold payment unreasonably and extend to the entire re-

lationship between the parties. See **Ballow v. PHICO Ins. Co.**, 875 P.2d 1354 (Colo. 1993). Whether this instruction may be modified for use when the alleged misconduct at issue is other than denial of or delay in payment of a claim has not yet been expressly decided. See **Dale v. Guar. Nat'l Ins. Co.**, 948 P.2d 545 (Colo. 1997) (insurance practices prohibited by statute illustrate conduct that legislature has determined to be unreasonable).

4. If this instruction is given and there is a dispute as to whether payment was denied or otherwise delayed, appropriate modifications should be made in the last paragraph of the instruction.

### Source and Authority

1. This instruction is supported by section 10-3-1113(4), which specifically incorporates subparagraphs (I) through (XIV) of section 10-3-1104(1)(h), but which does not incorporate later-added subparagraphs (XV) through (XVII) of section 10-3-1104(1)(h). See also **Peiffer v. State Farm Mut. Auto. Ins. Co.**, 940 P.2d 967 (Colo. App. 1996) (in determining whether insurer's delay in paying benefits or its denial of benefits was reasonable, jury may consider evidence that insurer's conduct violated any of the applicable subparagraphs of section 10-3-1104(1)(h)), *aff'd*, 955 P.2d 1008 (Colo. 1998).

2. Where plaintiff relied on statutory violations and a failure to investigate his claim, proof of industry standards through expert testimony was unnecessary to establish a bad faith breach of insurance contract. **Giampapa v. Am. Family Mut. Ins. Co.**, 919 P.2d 838 (Colo. App. 1995). In **American Family Mutual Insurance Co. v. Allen**, 102 P.3d 333, 344 (Colo. 2004), the supreme court observed that the UCSPA regulates insurers' conduct, but does not create a private right of action; nonetheless, the court held that the Act's standards "may be used as valid, but not conclusive, evidence of industry standards . . . ."

3. In **Parsons ex rel. Parsons v. Allstate Insurance Co.**, 165 P.3d 809, 817 (Colo. App. 2006), the court recognized that certain practices that violate the UCSPA, "such as not attempting in good faith to effectuate a prompt, fair, and equitable settlement once liability has become reasonably clear," might implicate conduct occurring after litigation is commenced. Those factors may be considered as evidence of an insurer's post-filing litigation conduct if the evidence satisfies the test established in **Parsons**. See *id.*

4. Reversing summary judgment in favor of an insurer that proved its compliance with a Department of Insurance regulation that declares non-compliance a presumptive violation of section 10-3-1104(1)(h)(III) and (IV), the court held that compliance meant, at best, the absence of a presumptive statutory violation, not a right to judgment in favor of the insurer. **Reyher v. State Farm Mut. Auto. Ins. Co.**, 171 P.3d 1263 (Colo. App. 2007).

**25:7 RECKLESS DISREGARD—DEFINED**

**An insurance company recklessly disregards the unreasonableness of its (conduct) (position) when it (acts) (takes a position) with knowledge of facts that indicate that its (conduct) (position) lacks a reasonable basis or when it is deliberately indifferent to information concerning the claim.**

**Notes on Use**

1. This instruction relates only to common-law first-party claims and must be given with Instruction 25:2 but must not be given in relation to a statutory claim provided by sections 10-3-1115 and -1116, C.R.S. **Vaccaro v. Am. Family Ins. Co.**, 2012 COA 9M, ¶ 21, 275 P.3d 750 (citing **Kisselman v. Am. Family Mut. Ins. Co.**, 292 P.3d 964 (Colo. App. 2011)).

2. If appropriate, an alternative phrase to “insurance company” (e.g., “self-insurer,” “surety,” “person,” “independent insurance adjuster”) should be used to describe the defendant.

**Source and Authority**

This instruction is supported by **Travelers Insurance Co. v. Savio**, 706 P.2d 1258 (Colo. 1985), and section 10-3-1113(3), C.R.S.

## 25:8 DUTY OF GOOD FAITH AND FAIR DEALING

An insurance company owes to those it insures the duty of good faith and fair dealing. That duty is breached if the company unreasonably (delays payment) (denies payment) (fails to communicate promptly and effectively) (*insert description of other conduct or position that may constitute bad faith breach of insurance contract*)(,) (.) (and the company knows that its [delay] [denial] [*insert description of other conduct or position that may constitute bad faith breach of insurance contract*] is unreasonable or it recklessly disregards whether its [conduct] [position] is unreasonable).

### Notes on Use

1. This instruction should be given in conjunction with Instruction 25:1 or 25:2. See **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995) (failure to define standard of care in terms of reasonableness was reversible error).

2. For the definition of “reckless disregard,” see Instruction 25:7.

3. When appropriate, an alternative phrase to “insurance company” (e.g., “self-insurer,” “surety,” “person,” “independent insurance adjuster”) should be used to describe the defendant.

4. The last parenthesized clause of this instruction must be included when this instruction is given in a common-law first-party case with Instruction 25:2 but must be omitted when this instruction is given in a common-law third-party case with Instruction 25:1. See § 10-3-1113(1)–(3), C.R.S.

5. The last parenthesized clause must also be omitted in a statutory first-party claim based on section 10-3-1116(1), C.R.S. **Kisselman v. Am. Family Mut. Ins. Co.**, 292 P.3d 964, 973 (Colo. App. 2011) (The statutory claim “expressly deletes [this] requirement.”).

### Source and Authority

1. This instruction is supported by **Travelers Ins. Co. v. Savio**, 706 P.2d 1258 (Colo. 1985); **Farmers Group, Inc. v. Trimble**, 691 P.2d 1138 (Colo. 1984); and section 10-3-1113(2) & (3). See also Source and Authority to Instructions 25:1 and 25:2.

2. An insurer’s duties of good faith and fair dealing arise from the special nature of insurance (to provide financial and emotional security against calamity) and the special relationship between insurer (superior

in economic power and having control over decision to provide benefits) and insured. **State Farm Mut. Auto. Ins. Co. v. Brekke**, 105 P.3d 177 (Colo. 2004); **Transamerica Premier Ins. Co. v. Brighton Sch. Dist.** 27J, 940 P.2d 348 (Colo. 1997); **Scott Wetzel Servs., Inc. v. Johnson**, 821 P.2d 804 (Colo. 1991).

3. Whether an insurer has breached its duties of good faith and fair dealing presents a question of “reasonableness under the circumstances.” **Trimble**, 691 P.2d at 1142.

4. The term bad faith breach of insurance contract is a misnomer insofar as it may suggest a requirement to prove bad motive or evil intent on the part of the insurer. In light of the nature of insurance and the special relationship between insurer and insured, insurers in the third-party context owe their insureds duties that are “quasi-fiduciary” in nature. **Brodeur v. Am. Home Assur. Co.**, 169 P.3d 139 (Colo. 2007) (citing **Trimble**, 691 P.2d at 1141) (quasi-fiduciary duty owed to insureds in third-party context because insurer has absolute right control defense of insured); **Goodson v. Am. Std. Ins. Co.**, 89 P.3d 409 (Colo. 2004) (quasi-fiduciary relationship exists between insurer and insured in third-party context because insurer stands in position of trust with regard to its insured); **Bankr. Estate of Morris v. COPIC Ins. Co.**, 192 P.3d 519 (Colo. App. 2008) (citing **Trimble**, 691 P.2d at 1141–42, in discussing insurer’s duties to insured in third-party context); **Olson v. State Farm Mut. Auto. Ins. Co.**, 174 P.3d 849 (Colo. App. 2007) (citing **Brodeur** and **Goodson**, and rejecting argument that quasi-fiduciary duty required insurer to inform insured in first-party context about when statute of limitations would expire).

5. The quasi-fiduciary relationship is limited to “areas in which the insurer exercises a strong degree of control over the insured’s interests.” **Bernhard v. Farmers Ins. Exch.**, 915 P.2d 1285, 1289 (Colo. 1996) (discussing difference between quasi-fiduciary and true fiduciary duties); *see also* **Brodeur**, 169 P.3d at 152 (holding that the relationship between the insured and the workers’ compensation insurer is neither a fiduciary nor a quasi-fiduciary relationship). *But see* **Brekke**, 105 P.3d at 189 (aspect of quasi-fiduciary relationship that is significant in uninsured motorist context is insurer’s duty to investigate and adjust in good faith); **Peterman v. State Farm Mut. Auto. Ins. Co.**, 961 P.2d 487 (Colo. 1998) (even though insurer almost adversary to insured in uninsured motorist context, insurer still owes contractual and quasi-fiduciary duties to insured). Neither **Brekke** nor **Peterman** has been expressly overruled.

6. The insurer’s duty to act in good faith is not limited to the failure to provide policy benefits, but permeates the entire relationship between the insurer and insured. **Ballow v. PHICO Ins. Co.**, 875 P.2d 1354 (Colo. 1993); *see* § 10-1-101, C.R.S. (“[A]ll persons having to do with insurance services to the public [shall] be at all times actuated by good faith in everything pertaining thereto . . . .”); **Wagner v. Travel-**

**ers Prop. Cas. Co. of Am.**, 209 P.3d 1119, 1128 (Colo. App. 2009) (describing section 10-1-101 “as a standard of care applicable to the insurance industry actionable as a private claim”).

7. Bad faith conduct is cumulative and is to be determined based upon the entire course of conduct between the insurer and the insured. **Dale v. Guar. Nat’l Ins. Co.**, 948 P.2d 545 (Colo. 1997) (overruling **Leahy v. Guar. Nat’l Ins. Co.**, 907 P.2d 697 (Colo. App. 1995)); *accord* **Pham v. State Farm Mut. Auto. Ins. Co.**, 70 P.3d 567, 572 (Colo. App. 2003) (“Bad faith breach of an insurance contract encompasses the entire course of conduct and is cumulative.”).

8. The duty of good faith and fair dealing does not arise, however, until the insurer is called upon to perform some duty imposed by the insurance contract. **Daugherty v. Allstate Ins. Co.**, 55 P.3d 224 (Colo. App. 2002). *But see* **Mullen v. Allstate Ins. Co.**, 232 P.3d 168 (Colo. App. 2009) (apparently assuming insurer’s failure to inform insured of certain characteristics of the policy at the time of issuance could be bad faith, though affirming summary judgment order that no duty to disclose was violated).

9. The fact that an insurer eventually pays all benefits due under an insurance contract is not dispositive of its liability for bad faith because it is the insurer’s affirmative act of refusing to pay benefits when due and failing to act in good faith, not the condition of nonpayment, that forms the basis of its liability. **Goodson**, 89 P.3d at 414 (citing **Trimble**, 691 P.2d at 1142).

10. An insurance company owes to those it insures the duty to communicate promptly and effectively with the insured and with anyone it was reasonably aware had or needed information pertaining to the insured’s claim. **Dunn v. Am. Family Ins.**, 251 P.3d 1232 (Colo. App. 2010); *see* § 10-3-1104(1)(h)(II) & (V), C.R.S.

11. Although an insurance company owes a duty to its insured to adjust a claim in good faith, an insurance company owes no such duty to a third-party making a claim against its insured. **Goodson**, 89 P.3d at 415; **Lazar v. Riggs**, 79 P.3d 105 (Colo. 2003).

**25:9 ACTUAL DAMAGES—COMMON-LAW CLAIMS**

Plaintiff, *(name)*, has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) (its) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the bad faith breach of insurance contract by the defendant(s), *(name[s])* (and the *[insert appropriate description, e.g., "negligence"]* of any designated nonparties).

In determining these damages, you shall consider the following:

1. Any noneconomic losses or injuries that plaintiff has had or will probably have in the future, including: *(insert any recoverable noneconomic losses for which there is sufficient evidence)*; and

2. Any economic losses that plaintiff has had or will probably have in the future, including: *(insert any recoverable economic losses for which there is sufficient evidence)*.

(3. Any [physical impairment] [or] [disfigurement]. In considering damages in this category, you shall not include damages again for losses or injuries already determined under either numbered paragraph 1 or 2.)

**Notes on Use**

1. The Notes on Use to Instruction 6:1 are also applicable to this instruction.

2. This instruction applies only to common-law claims under Instructions 25:1 and 25:2 and may not be given in statutory first-party claims under sections 10-3-1115 and -1116, C.R.S., submitted under Instructions 25:4 and 25:10.

3. The amount of damages requested should not be stated in this instruction or in the statement of the case. **Rodrigue v. Hausman**, 33 Colo. App. 305, 519 P.2d 1216 (1974).

4. When the insurer spotlights the insured's preexisting mental or

physical condition in an attempt to avoid or reduce liability to pay benefits, a “thin-skull” instruction should be given. **State Farm Mut. Auto. Ins. Co. v. Peiffer**, 955 P.2d 1008 (Colo. 1998).

5. An insured’s judgment for economic damages in the form of covered UM/UIM benefits may not be set off by amounts insurer paid pursuant to medical payments (MedPay) coverage. **Calderon v. Am. Family Mut. Ins. Co.**, 2016 CO 72, ¶ 17, 383 P.3d 676. However, setoff for MedPay benefits paid is permissible when it is part of a negotiated settlement agreement prior to suit or judgment. **Arline v. Am. Family Mut. Ins. Co.**, 2018 COA 82, ¶ 13, 431 P.3d 670.

### Source and Authority

1. This instruction is supported by **Farmers Group, Inc. v. Trimble**, 658 P.2d 1370 (Colo. App. 1982, *aff’d*, 691 P.2d 1138 (Colo. 1984). See also **Ballow v. PHICO Ins. Co.**, 878 P.2d 672 (Colo. 1994) (in action for bad faith breach of insurance contract, insured is entitled to recover damages based on traditional tort principles of compensation for injuries actually suffered, including emotional stress); **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003); **Herod v. Colo. Farm Bureau Mut. Ins. Co.**, 928 P.2d 834 (Colo. App. 1996); **Bernhard v. Farmers Ins. Exch.**, 885 P.2d 265 (Colo. App. 1994), *aff’d on other grounds*, 915 P.2d 1285 (Colo. 1996); **South Park Aggregates, Inc. v. Nw. Nat’l Ins. Co.**, 847 P.2d 218 (Colo. App. 1992) (citing instruction with approval).

2. For a comparison of damages recoverable in contract and tort for an insurer’s breach of the duty to defend a third-party action, see **Bainbridge, Inc. v. Travelers Casualty Co.**, 159 P.3d 748 (Colo. App. 2006).

3. If an insurance company acts unreasonably in refusing to settle for policy limits, but later tenders those limits, the damages incurred by the insured after the tender of limits that were not caused by the insurer’s conduct are not recoverable. However, the insurer may be liable for damages incurred after the policy limits have been tendered, if the refusal to accept the tender could reasonably be viewed as a natural and probable consequence of the earlier unreasonable conduct of the insurer. **Bernhard**, 885 P.2d at 270.

4. In determining economic damages under this instruction, the jury may consider the benefits the insured should have received under the policy, and this consideration is proper even in cases where the insured’s claim for breach of contract is time-barred. **Herod**, 928 P.2d at 837 (“[M]erely because the damages for bad faith breach may have been the same as those for breach of contract does not mean that the jury’s award was improper.”).

5. Economic damages need not be ascertainable by arithmetic formula but may be an approximation if the record shows that the fact

of damages is certain and provides some evidence that allows the jury to reasonably estimate damages. **Schuessler v. Wolter**, 2012 COA 86, ¶¶ 48–57, 310 P.3d 151 (refusal to grant new trial based on sufficiency of plaintiffs damages).

6. Prejudgment interest is a form of compensatory damages and, unless the policy states otherwise, is subject to a liability policy's indemnity limits. **Old Republic Ins. Co. v. Ross**, 180 P.3d 427 (Colo. 2008) (citing **Allstate Ins. Co. v. Starke**, 797 P.2d 14 (Colo. 1990)). In a bad faith breach of contract action against a liability insurer, however, prejudgment interest is not subject to limits because "the insurer cannot use [the insurance] contract to shield itself from liability for its own wrongdoing." **Ross**, 180 P.2d at 437.

7. In assessing prejudgment interest for contractual benefits wrongfully delayed or denied, the wrongful withholding interest statute, § 5-12-102(1)(a), C.R.S., not the personal injury interest statute, § 13-21-101, C.R.S., is to be applied. **Schuessler**, 2012 COA 86, ¶ 102; *cf.* **USAA v. Parker**, 200 P.3d 350 (Colo. 2009) (Court held that a claim for UIM benefits is premised on a claim for bodily injury and sounds in tort, not contract. Therefore, the proper prejudgment interest rate to be applied to recovery in the form of UIM benefits is that provided for personal injury recoveries in section 13-21-101 (nine percent per annum)).

8. Where an insurer's conduct is proven to constitute a deceptive practice in violation of the Colorado Consumer Protection Act (CCPA), attorney fees may be recovered, § 6-1-113(2)(b), C.R.S., and if "bad faith conduct" is established by clear and convincing evidence, treble damages may also be awarded. § 6-1-113(2). The CCPA defines "bad faith conduct" as "fraudulent, willful, knowing, or intentional conduct that causes injury." § 6-1-113(2.3). **Showpiece Homes Corp. v. Assurance Co. of Am.**, 38 P.3d 47 (Colo. 2001) (CCPA applies to sale of insurance and to post-sale bad faith handling of an insured's claims). In **Coors v. Security Life of Denver Insurance Co.**, 91 P.3d 393 (Colo. App. 2003), *aff'd in part, rev'd in part on other grounds*, 112 P.3d 59 (Colo. 2005), the court of appeals stated that **Showpiece Homes** does not eliminate the requirement that plaintiff must establish defendant's conduct constitutes a deceptive trade practice as identified in section 6-1-105, C.R.S., and also that a violation of the Unfair Claims-Deceptive Practices Act does not constitute, per se, a violation of the CCPA. However, simply asserting that an insurer acted in bad faith will not justify proceeding on a CCPA claim, because showing bad faith does not fulfill the element of significant public impact, which is one of the required elements of a CCPA claim. **Bankruptcy Estate of Morris v. COPIC Ins. Co.**, 192 P.3d 519 (Colo. App. 2008); *see also* Chapter 29 & Instruction 29:4.

9. As noted in **Goodson v. American Standard Insurance Co.**, 89 P.3d 409 (Colo. 2004), noneconomic damages enumerated in section 13-21-102.5(2)(b), C.R.S. (i.e., emotional distress, pain and suffering, inconvenience, fear and anxiety, and impairment of the quality of life) are

recoverable for an insurer's bad faith breach of insurance contract without proof of any accompanying substantial financial or property loss. **Goodson**, 89 P.3d at 416–17 (overruling in part **Farmers Group, Inc. v. Trimble**, 768 P.2d 1243 (Colo. App. 1988)).

10. Section 13-15-111.5, C.R.S., “requires apportionment of liability among negligent and intentional tortfeasors who contributed to an indivisible injury . . . .” **Slack v. Farmers Ins. Exch.**, 5 P.3d 280, 282 (Colo. 2000) (PIP insurer, against whom claims for negligence and bad faith were stated based upon negligent referral of claimant to an IME examiner who sexually assaulted claimant, permitted to designate examiner as nonparty at fault).

11. Attorney fees are recoverable as damages for common-law bad faith breach of insurance contract only when those fees are a wrongfully denied benefit of the insurance contract itself (e.g., fees incurred as a result of a liability insurer's refusal to provide a defense); but fees incurred in prosecuting a bad faith tort action are not recoverable. **Bernhard v. Farmers Ins. Exch.**, 915 P.2d 1285 (Colo. 1996) (disapproving of **Trimble**, 768 P.2d at 1246, insofar as it allowed recovery of attorney fees incurred in obtaining benefits tortiously withheld).

## 25:10 BENEFIT AMOUNT—FIRST-PARTY STATUTORY CLAIMS

Plaintiff, (*name*), has the burden of proving, by a preponderance of the evidence, the extent of (his) (her) (its) benefits that were improperly (delayed) (denied). If you find in favor of the plaintiff on (his) (her) (its) claim under Instruction No. — (*insert number of instruction corresponding to Instruction 25:4*), you must determine the total dollar amount of the benefits for which payment was (delayed) (denied) without a reasonable basis.

### Notes on Use

1. Use whichever parenthesized or bracketed portions are appropriate.

2. The remedies provided by section 10-3-1116(1), C.R.S., include “reasonable attorney fees and court costs and two times the covered benefit,” both of which are imposed as statutory damages by the court post-trial. **Hall v. Am. Standard Ins. Co.**, 2012 COA 201, ¶ 20, 292 P.3d 1196. This instruction asks the jury to determine the amount of the covered benefit for which payment was unreasonably delayed or denied for use by the court in awarding the “two times” statutory damage.

3. This instruction should not be given if the amount of the covered benefit is not disputed. See **Hansen v. Am. Family Mut. Ins. Co.**, 2013 COA 173, ¶ 58, 383 P.3d 28 (affirming judgment for two times covered UIM benefit and attorney fees and costs where the jury found unreasonable delay in payment of the benefit amount paid pursuant to a pretrial settlement), *rev’d on other grounds*, 2016 CO 46, 375 P.3d 115.

4. Section 10-3-1116(4) provides that “[d]amages awarded pursuant to this section shall not be recoverable in any other action or claim.”

5. The statutory damage remedies provided by section 10-3-1116(1) are not subject to the one-year limitation of actions period in section 13-80-103(1)(d), C.R.S., as they were not intended by the legislature to operate as a penalty in the context of section 13-80-103(1)(d) applicable to “any penalty or forfeiture.” **Rooftop Restoration, Inc. v. Am. Family Mut. Ins. Co.**, 2018 CO 44, ¶ 16, 418 P.3d 1173.

6. The award of “two times the covered benefit” allowed under section 10-3-1116(1) may not be reduced by the amount of an unreasonably delayed benefit paid prior to judgment. **Am. Family Mut. Ins. Co. v. Barriga**, 2018 CO 42, ¶ 11, 418 P.3d 1181.

7. Under section 10-3-1115, C.R.S., “insurers have a duty not to unreasonably delay or deny payment of covered benefits, even though other components of an insured’s claim may still be reasonably in dispute.” **State Farm Mut. Auto. Ins. Co. v. Fisher**, 2018 CO 39, ¶ 27, 418 P.3d 501, 506.

### Source and Authority

1. This instruction is supported by section 10-3-1116(1), (4); and **Kisselman v. American Family Mutual Insurance Co.**, 292 P.3d 964 (Colo. App. 2011).

2. Until fees and costs awarded as statutory damages pursuant to section 10-3-1116(1) are reflected in a written order, judgment is not final for purposes of appeal. **Hall**, 2012 COA 201, ¶ 21.

3. Award of reasonable attorney fees under section 10-3-1116(1) is not limited by a contingent agreement between counsel and the insured, which is but one factor in trial court’s determination of reasonable fees. **Melssen v. Auto-Owners Ins. Co.**, 2012 COA 102, ¶ 70, 285 P.3d 328.

4. Fees incurred in prosecuting the statutory claim for attorney fees (“fees-on-fees”) are recoverable pursuant to section 10-3-1116(1). When payment of a covered benefit is delayed without a reasonable basis, two times the amount of that benefit remains recoverable despite the prior payment. **Nibert v. Geico Cas. Co.**, 2017 COA 23, ¶ 25. The statutory remedy creates an exception to the American Rule and authorizes “fees on fees” recovery because attorney fees are part of the damage calculation. *Id.* at ¶ 32; **Stresscon Corp. v. Travelers Prop. Cas. Co. of Am.**, 2013 COA 131, ¶ 120, 373 P.3d 615, *rev’d on other grounds*, 2016 CO 22M, 370 P.3d 140.

5. In determining the maximum limit on recoverable punitive damages for purposes of final judgment, attorney fees and costs awarded under section 10-3-1116(1) are a component of actual damages to be included in calculating the permissible amount of punitive damages owed to a prevailing plaintiff. **Guar. Tr. Life Ins. Co. v. Estate of Casper**, 2018 CO 43, ¶¶ 1, 25, 418 P.3d 1163.

6. Due to their shared elements, litigating a common law and statutory bad faith claim in the same case is “inescapably intertwined.” A trial court has the discretion to award reasonable attorney fees without limiting them to work performed on the statutory claim. *Id.* at ¶¶ 33, 37 (citing **Fisher v. State Farm Mut. Auto. Ins. Co.**, 2015 COA 57, ¶ 23, 419 P.3d 985, *aff’d on other grounds*, 2018 CO 39, 418 P.3d 501); *see also* **Estate of Casper v. Guar. Tr. Life Ins. Co.**, 2016 COA 167, ¶ 81, 421 P.3d 1184 (overall reduction of attorney fee and cost damages more than sixty percent of amount sought not an abuse of discretion), *aff’d in part, rev’d in part on other grounds*, 2018 CO 43, 418 P.3d 1163.

7. Attorney fees and costs incurred in successfully defending appeal

of the statutory award are also recoverable. **Nibert**, 2017 COA 23, ¶ 38; **Stresscon Corp.**, 2013 COA 131, ¶ 136 (allowing recovery of fees and costs incurred on appeal when party was awarded fees and costs in a prior stage of the proceedings) (citing **Melssen**, 2012 COA 102, ¶ 75; **Kennedy v. King Soopers Inc.**, 148 P.3d 385 (Colo. App. 2006)).

## 25:11 PUNITIVE DAMAGES

### Use Instruction 5:4.

#### Notes on Use

1. Instruction 5:4 (exemplary or punitive damages), along with 3:3 (reasonable doubt) or 9:30 (willful and wanton conduct), should be used in accordance with applicable Notes on Use.

2. Absent proof of actual damages flowing from an insurer's bad faith breach of insurance contract, the plaintiff is not entitled to punitive damages as a matter of law. **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003).

3. The fact that an insured's proof is sufficient to support an award for bad faith breach of insurance contract does not alone establish a claim for punitive damages. **Farmers Grp., Inc. v. Trimble**, 768 P.2d 1243 (Colo. App. 1988), *overruled on other grounds by* **Goodson v. Am. Standard Ins. Co.**, 89 P.3d 409 (Colo. 2004). The insured must, as with all claims for punitive damages, establish the requisite circumstances of fraud, malice, or willful and wanton conduct before a claim for punitive damages may be properly submitted to the factfinder. **Ballow v. PHICO Ins. Co.**, 878 P.2d 672 (Colo. 1994).

#### Source and Authority

1. This instruction is supported by section 13-21-102, C.R.S.; **Ballow**, 878 P.2d at 682; and **Trimble**, 768 P.2d at 1247.

2. Punitive damages are not ordinarily recoverable in a breach of contract case, **Mortgage Fin., Inc. v. Podleski**, 742 P.2d 900 (Colo. 1987), but because bad faith breach of insurance contract is a tort, punitive damages may be awarded in an appropriate case. **Ballow**, 878 P.2d at 682; **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995); **Surdyka v. DeWitt**, 784 P.2d 819 (Colo. App. 1989).

3. An insurer's failure to conduct a reasonable investigation in its handling of a claim may be sufficient to support a punitive damages claim. **Giampapa v. Am. Family Mut. Ins. Co.**, 919 P.2d 838 (Colo. App. 1995) (punitive damages award affirmed where insurer failed to conduct any investigation into medical necessity of claim and violated statutory requirements); **Burgess v. Mid-Century Ins. Co.**, 841 P.2d 325 (Colo. App. 1992) (insurer's deviation from industry standards and failure to follow its own investigative procedures sufficient to support punitive damage award); **Brewer v. Am. & Foreign Ins. Co.**, 837 P.2d 236 (Colo. App. 1992) (same). Similarly, a liability insurer's improper handling of a settlement offer may result in a punitive damages claim being submitted to a jury. **Miller**, 916 P.2d at 580 (submission of punitive damages issue to jury was proper where insurer rejected settlement

offer and made counteroffer for less than policy limits despite believing that case's value exceeded policy limits, without communicating these actions to the insured).

4. The statutory language regarding enhancement of punitive damages, § 13-21-102(3), is permissive rather than mandatory and the trial court is entrusted with sound discretion in exercising its authority. **Harvey v. Farmers Ins. Exch.**, 983 P.2d 34 (Colo. App. 1998), *aff'd on other grounds sub nom. Slack v. Farmers Ins. Exch.*, 5 P.3d 280 (Colo. 2000).

5. Reasonable attorney fees and court costs awarded under section 10-3-1116(1), C.R.S., are actual damages that must be included in calculation of the total amount of actual damages for determination of the statutory limit of recoverable punitive damages awarded by a jury set forth in section 13-21-102(a). **Estate of Casper v. Guar. Tr. Life Ins. Co.**, 2016 COA 167, ¶ 58, *aff'd in part, rev'd in part on other grounds*, 2018 CO 43, 418 P.3d 1163.

6. Generally speaking, a punitive damages award may not exceed the amount of actual damages awarded. § 13-21-102(1)(a). However, section 13-21-102(3)(b) allows a trial court to increase any punitive damages award to a sum not to exceed three times the actual damages if, during the pendency of the action, the insurer engages in conduct that it knew or should have known would aggravate the damages to the insured. *See Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59 (Colo. 2005) (authorizing punitive damages award based on trial court's findings on different claim and determining that trebling of punitive damages award was appropriate given defendant's behavior during pendency of case); **Tait v. Hartford Underwriters Ins. Co.**, 49 P.3d 337 (Colo. App. 2001) (increase of punitive damage award under section 13-21-102(3)(a) affirmed where insurer sought removal to defeat state statute giving preferential trial dates to elderly plaintiffs, abused discovery process, and delegated to defense counsel its continuing obligations to the insured); **Harvey**, 983 P.2d at 40 (trial court acted within its discretion in declining to treble punitive damage award where insurer's continuing course of conduct was controverted and not sufficiently compelling to warrant reversal).

## CHAPTER 26. BREACH OF FIDUCIARY DUTY

26:1 Elements of Liability

26:2 Fiduciary Relationship—Defined

26:3 Fiduciary Relationship Arising out of a Confidential Relationship

26:4 Confidential Relationship—Defined

26:5 Actual Damages

### 26:1 ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of breach of fiduciary duty, you must find that all of the following have been proved by a preponderance of the evidence:

1. The defendant was acting as a fiduciary of the plaintiff with respect to (*insert appropriate description of the subject matter, e.g., "sale of plaintiff's house"*);

2. The defendant breached a fiduciary duty to the plaintiff;

3. The plaintiff had (injuries) (damages) (losses); and

4. The defendant's breach of fiduciary duty was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. Omit any numbered paragraph the facts of which are not in dispute.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. When the court directs a verdict as to the existence of a fiduciary relationship and the subject matter of such a relationship, this instruction should be modified according to Note on Use 5 of this instruction. See **Paine, Webber, Jackson & Curtis, Inc. v. Adams**, 718 P.2d 508 (Colo. 1986).

4. Although the second element requires that the defendant breach a fiduciary duty owed to the plaintiff, the Colorado Court of Appeals in **Taylor v. Taylor**, 2016 COA 100, 381 P.3d 428, concluded that a plaintiff may maintain a breach of fiduciary duty claim where the fiduciary duty is owed to a third party so long as the plaintiff can establish standing. See **Taylor**, ¶¶ 14–25 (holding that settlor's children had standing to bring action against trustee for breach of fiduciary duty even though trustee's fiduciary duty was owed to the settlor and not to the children). *But cf.* **Baker v. Wood, Ris & Hames, P.C.**, 2016 CO 5, ¶¶ 20–35, 364 P.3d 872 (declining to extend liability of a testator's attorney to non-client beneficiaries, except where the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation). Accordingly, where the court has concluded that a plaintiff has standing to pursue a breach of fiduciary duty claim in circumstances in which the fiduciary duty was owed to a third party, this element of the instruction should be modified accordingly.

5. If there is a dispute as to whether the defendant was acting as a fiduciary of the plaintiff, Instruction 26:2 or 26:3 should be given with this instruction together with any additional instructions that may be required, e.g., Instruction 8:1, defining "agent" and "principal." If there is no such dispute, the first numbered paragraph should be omitted, the jury should be instructed that a fiduciary relationship existed between

the parties, and only the first sentence of Instruction 26:2 should be given in order to define the fiduciary relationship.

6. Appropriate instructions defining other terms used in this instruction must also be given, for example, an instruction or instructions relating to causation. *See* Instructions 9:18–9:21.

7. Use whichever parenthesized words are appropriate.

8. If the defendant has put no affirmative defense in issue or there is insufficient evidence to support a defense, the last two paragraphs should be omitted.

9. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

10. If plaintiff is alleging the existence of a fiduciary duty arising out of a confidential relationship, Instructions 26:3 and 26:4 should be given with this instruction.

11. This instruction does not apply to claims for relief that are equitable rather than legal. *Compare* **Kaitz v. Dist. Court**, 650 P.2d 553 (Colo. 1982), *with* **Paine, Webber, Jackson & Curtis**, 718 P.2d at 513–14. *See also* **Mahoney Mktg. Corp. v. Sentry Builders**, 697 P.2d 1139, 1140 (Colo. App. 1985) (“Although fiduciary obligations are equitable in nature, the remedies [for breach] are generally at law.”).

### Source and Authority

1. This instruction is supported by **Rupert v. Clayton Brokerage Co.**, 737 P.2d 1106 (Colo. 1987); **Paine, Webber, Jackson & Curtis**, 718 P.2d at 514–15; **Kunz v. Warren**, 725 P.2d 794 (Colo. App. 1986); and **Brunner v. Horton**, 702 P.2d 283 (Colo. App. 1985). *See also* **Accident & Injury Med. Specialists, P.C. v. Mintz**, 2012 CO 50, ¶ 21, 279 P.3d 658; **Destefano v. Grabrian**, 763 P.2d 275 (Colo. 1988); **Bithell v. W. Care Corp.**, 762 P.2d 708 (Colo. App. 1988).

2. Because an action for damages for breach of a duty not to disclose confidential information lies in tort, and is legal rather than equitable, it will support a claim for punitive damages. **Rubenstein v. S. Denver Nat'l Bank**, 762 P.2d 755 (Colo. App. 1988); *see also* **Virdanco, Inc. v. MTS Int'l**, 820 P.2d 352 (Colo. App. 1991) (where primary purpose of action for breach of fiduciary duty was to recover compensatory damages, action was primarily legal and, therefore, punitive damages were recoverable, even though plaintiff also sought equitable remedy of accounting).

3. For a discussion of the elements necessary to establish the tort of aiding and abetting a breach of a fiduciary duty, see **Nelson v. Elway**, 971 P.2d 245 (Colo. App. 1998), and **Holmes v. Young**, 885 P.2d 305 (Colo. App. 1994).

4. Where the same operative facts support claims for both legal malpractice and breach of fiduciary duty, the latter claim should be dismissed as duplicative. **Moguls of Aspen, Inc. v. Faegre & Benson**, 956 P.2d 618 (Colo. App. 1997). On the other hand, where the facts and duties underlying claims for breach of a fiduciary duty and negligence are not the same, it is proper to submit both claims to the jury. **Boyd v. Garvert**, 9 P.3d 1161 (Colo. App. 2000). Expert testimony is necessary to support causation in a breach of fiduciary case arising out of an attorney-client relationship. **Allen v. Martin**, 203 P.3d 546 (Colo. App. 2008).

5. Where a breach of fiduciary duty claim is based on a misuse of property held in trust, a plaintiff need only show a transfer to or use of trust property by the fiduciary to raise a rebuttable presumption of a breach of fiduciary duty and establish a prima facie case. The fiduciary must then introduce some evidence to show that the transaction was fair and reasonable. If such evidence is introduced, the trier of fact must then determine, based on all the evidence, whether the plaintiff has proven her claim of breach of fiduciary duty by a preponderance of the evidence. See **Estate of Heyn**, 47 P.3d 724 (Colo. App. 2002); see also **In re Estate of Foiles**, 2014 COA 104, ¶¶ 15, 45, 338 P.3d 1098 (trial court erred in failing to recognize prima facie case of breach of fiduciary duty where trustee transferred trust property to himself).

6. In the absence of a trust provision allowing ratification by a co-trustee of otherwise invalid actions, only the consent of all beneficiaries who have proper capacity and are fully informed of the facts can ratify an action taken in violation of a trust agreement. Accordingly, the trial court erred in ruling that beneficiary's breach of fiduciary duty claim against one trustee was precluded by ratification of the suspect transaction by the co-trustee. **In re Estate of Foiles**, 2014 COA 104, ¶ 43.

7. Colorado recognizes a claim for breach of a duty of loyalty arising out of an employer-employee relationship. **Jet Courier Serv., Inc. v. Mulei**, 771 P.2d 486 (Colo. 1989) (employee with a high level of authority in the employer's organization is an agent, has a duty to act solely for his principal's benefit, and violates that duty by setting up his business by soliciting customers and urging co-workers to leave with him before terminating employment). When the circumstances demonstrate that the employee is an agent of the employer, the duty of loyalty applies. See **Graphic Directions, Inc. v. Bush**, 862 P.2d 1020 (Colo. App. 1993) (employee handled technical aspects of client accounts and supervised work of artists, thus demonstrating sufficient authority to create agency relationship and duty of loyalty to employer); see also **Lucht's Concrete Pumping, Inc. v. Horner**, 224 P.3d 355 (Colo.

App. 2009) (employee's authority made him an agent of the employer and created a fiduciary relationship), *rev'd on other grounds*, 255 P.3d 1058 (Colo. 2011); **Koontz v. Rosener**, 787 P.2d 192 (Colo. App. 1989) (employees breached duty of loyalty by shortlisting and discouraging real estate offerings and soliciting co-workers to join their anticipated venture).

8. A fiduciary has the duty to disclose only material information. Therefore, a breach of fiduciary duty by non-disclosure requires that the undisclosed information be material. **Moye White LLP v. Beren**, 2013 COA 89, ¶¶ 27, 38, 320 P.3d 373 (attorney's medical and arrest history was not material because risk of impaired legal representation was speculative).

**26:2 FIDUCIARY RELATIONSHIP—DEFINED**

A fiduciary relationship exists whenever one person is entrusted to act for the benefit of or in the interests of another and has the legal (power) (authority) to do so.

If you find that the defendant, *(name)*, was acting as (a) (an) *(insert appropriate description, e.g., “attorney,” “partner,” “joint venturer,” “agent,” etc.)* of the plaintiff, *(name)*, with respect to *(insert appropriate description of subject matter, e.g., “sale of plaintiff’s house”)*, then you are instructed that the defendant was acting as a fiduciary of the plaintiff, *(name)*, with respect to *(insert appropriate description of subject matter)*.

**Notes on Use**

1. When, based on undisputed facts, the court determines as a matter of law that the defendant was acting as a fiduciary for the plaintiff with respect to the subject matter of the suit, the jury should be instructed that the court has determined that a fiduciary relationship existed between the parties, and define that fiduciary relationship by using the first sentence of this instruction. However, when the alleged relationship between the parties, if proven, would establish the existence of a fiduciary relationship as a matter of law, but the facts giving rise to such a relationship are in dispute, then the second paragraph of this instruction should also be given. Depending on the nature of the fiduciary relationship alleged and the particular facts in dispute, this instruction may require modification.

2. If plaintiff is claiming that the fiduciary duty arose out of a confidential relationship and there is sufficient evidence to support that claim, then Instruction 26:3, rather than this instruction, should be used.

**Source and Authority**

1. This instruction is supported by **Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP**, 2018 CO 54, ¶ 60, 420 P.3d 223; **Accident & Injury Medical Specialists, P.C. v. Mintz**, 2012 CO 50, ¶ 21, 279 P.3d 658; and **Moses v. Diocese of Colo.**, 863 P.2d 310 (Colo. 1993). See also **Lucas v. Abbott**, 198 Colo. 477, 601 P.2d 1376 (1979) (joint venturers); **McKinney v. Christmas**, 143 Colo. 361, 353 P.2d 373 (1960) (real estate agent); **Howard v. Hester**, 139 Colo. 255, 338 P.2d 106 (1959) (attorney and real estate agent); **Midwest**

**Mut., Inc. v. Heald**, 106 Colo. 552, 108 P.2d 535 (1940) (attorney); **Hart v. Colo. Real Estate Comm'n**, 702 P.2d 763 (Colo. App. 1985) (agent as a fiduciary); **Brunner v. Horton**, 702 P.2d 283 (Colo. App. 1985) (same).

2. A prerequisite to finding a fiduciary duty is the existence of a fiduciary relationship. **Moses**, 863 P.2d at 321 (record supported jury's determination that fiduciary relationship existed between bishop and parishioner where there was evidence that bishop occupied superior position over parishioner, was able to exert substantial influence over parishioner, and assumed a duty to act in the best interests of the parishioner).

3. Fiduciary duties arise only as to matters within the scope of the fiduciary relationship. See **Mintz v. Accident & Injury Med. Specialists, PC**, 284 P.3d 62, 68 (Colo. App. 2010) (explaining that a "fiduciary relationship exists between two persons when one of them has undertaken a duty to act for or to give advice for the benefit of another on matters within the relationship's scope"), *aff'd*, 2012 CO 50, 279 P.3d 658; see also **Semler v. Hellerstein**, 2016 COA 143, ¶¶ 35–40, 428 P.3d 555 (recognizing that board members of a homeowners' association owe fiduciary duties to both the association and its members, but affirming dismissal of breach of fiduciary duty claim against association treasurer because treasurer was not bound by his fiduciary duties when acting wholly outside the scope of his board position), *rev'd on other grounds sub nom.* **Bewley v. Semler**, 2018 CO 79, 432 P.3d 582.

4. Parties to a contract may disclaim the existence of a joint venture, thereby disclaiming any fiduciary relationship that would otherwise arise from one joint venturer to another. **Rocky Mountain Expl.**, 2018 CO 54, ¶ 62, 420 P.3d at 235 ("Even when a fiduciary relationship exists, however, the parties may modify—or even disclaim—that relationship.").

5. For a definition of a "fiduciary," see **Taylor v. Taylor**, 2016 COA 100, ¶ 13 n.1, 381 P.3d 428, 431 ("A fiduciary is required to act with good faith and loyalty, unaffected by personal motives."); and **Tepley v. Public Employees Retirement Ass'n**, 955 P.2d 573 (Colo. App. 1997) (fiduciary is a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with the undertaking). See also **Application for Water Rights of Town of Minturn**, 2015 CO 61, ¶ 11, 359 P.3d 29, 31 (recognizing that the "relationship between a trustee and a beneficiary is fiduciary in nature" and explaining that a "fiduciary relationship involves a duty on the part of the fiduciary to act for the benefit of the other party as to matters within the scope of the relationship" (quoting 1 A. WAKEMEN SCOTT, ET AL., SCOTT AND ASCHER ON TRUSTS §§ 2.1.5, at 37 & 2.1.6, at 38 (5th ed. 2006))). A "fiduciary" may also be defined by statute. See, e.g., § 15-1-103(2), C.R.S. (defining "fiduciary" under the Uniform Fiduciaries Law).

6. In the principal-agent context, it is the agent who owes a fidu-

ciary duty to the principal; a principal owes some duties to the agent but they are not fiduciary. **MDM Grp. Assocs., Inc. v. CX Reinsurance Co.**, 165 P.3d 882 (Colo. App. 2007).

7. Corporate agents may in some circumstances have a fiduciary relationship with third parties. See **Alexander v. Anstine**, 152 P.3d 497 (Colo. 2007) (directors and officers of insolvent corporation have limited fiduciary duty not to favor their own interests over those of creditors). But see **Weinstein v. Colborne Foodbotics, LLC**, 2013 CO 33, ¶ 23, 302 P.3d 263 (holding that a creditor of an insolvent LLC could not assert a claim for breach of fiduciary duty against the LLC's managers because the LLC Act expressly provides that managers are not liable for debts of the LLC and extends no fiduciary duty to creditors).

8. For other cases analyzing the existence of a fiduciary relationship, see **Baker v. Wood, Ris & Hames, P.C.**, 2016 CO 5, ¶¶ 20–35, 364 P.3d 872, 879 (reiterating that Colorado follows a rule of “strict privity” in limiting the fiduciary duty owed by attorneys to their clients only and not third parties and holding that “an attorney’s liability to a non-client is limited to the narrow set of circumstances in which the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation”); **Trujillo v. Colorado Division of Insurance**, 2014 CO 17, ¶ 20 & n.14, 320 P.3d 1208 (although insurance producers owe fiduciary duties to insured and insurers under plain language of section 10-2-704(1)(a), C.R.S., bail bondsmen did not violate this fiduciary duty with respect to his client because she was not an “insured” within the meaning of the statute); **Mintz**, 2012 CO 50, ¶ 19 (attorney did not owe fiduciary duties to third party medical providers who were owed money by attorney’s clients out of insurance settlement proceeds placed into attorney’s COLTAF account); **Brodeur v. American Home Assurance Co.**, 169 P.3d 139 (Colo. 2007) (workers’ compensation insurer owes no fiduciary duty to insured); **Destefano v. Grabrian**, 763 P.2d 275 (Colo. 1988) (priest acting as marriage counselor had fiduciary relationship to both husband and wife with respect to their marital relationship); **Paine, Webber, Jackson & Curtis, Inc. v. Adams**, 718 P.2d 508 (Colo. 1986) (stockbroker who had practical control over customer’s account had fiduciary duty to customer with respect to handling account); **Semler**, 2016 COA 143, ¶¶ 35–40 (recognizing that board members of a homeowners’ association owe fiduciary duties to both the association and its members, but affirming dismissal of breach of fiduciary duty claim against association treasurer because treasurer was not bound by his fiduciary duties when acting wholly outside the scope of his board position); **Gessler v. Grossman**, 2015 COA 62, ¶¶ 18–20 (holding that the public trust statute, § 24-18-103, C.R.S., is not merely hortatory, but sets forth a specific standard of conduct by imposing a fiduciary duty on public officials), *aff’d sub nom.* **Gessler v. Smith**, 2018 CO 48, 419 P.3d 964; **LaFond v. Sweeney**, 2012 COA 27, ¶¶ 38–42, 345 P.3d 932 (members of LLC law firm owed one another fiduciary duties and such duties continued subsequent to dissolution of the LLC but before the winding up of the LLC was completed), *aff’d*, 2015 CO 3, 343 P.3d 939; **Ludlow v. Gibbons**, 310

P.3d 130 (Colo. App. 2011) (section 12-61-803(2), C.R.S., provides that the exclusive method for a real estate broker to assume fiduciary duties to a party to a real estate transaction is through a written agreement), *rev'd on other grounds*, 2013 CO 49, 304 P.3d 239; **A Good Time Rental, LLC v. First American Title Agency, Inc.**, 259 P.3d 534 (Colo. App. 2011) (any fiduciary-type relationship between a closing agent and its client does not trump the economic loss rule); **Barfield v. Hall Realty, Inc.**, 232 P.3d 286 (Colo. App. 2010) (real estate transaction broker does not have a fiduciary relationship with either party to a real estate transaction); **Olson v. State Farm Mutual Automobile Insurance, Co.**, 174 P.3d 849 (Colo. App. 2007) (no quasi-fiduciary duty between insurer and insured requiring insurer to inform insured of statute of limitations on claim for UM benefits); **Premier Farm Credit, PCA v. W-Cattle, LLC**, 155 P.3d 504 (Colo. App. 2006) (absent special circumstances, relationship between lending institution and customer is not a fiduciary relationship but merely one of creditor and debtor); **Equitex, Inc. v. Ungar**, 60 P.3d 746 (Colo. App. 2002) (attorney's longstanding relationship with corporation and its president did not give rise to fiduciary duties on part of corporation or its president where they had not assumed any responsibility to represent attorney's interests and attorney had not been induced to place trust or confidence in corporation or its president); **Turkey Creek, LLC v. Rosania**, 953 P.2d 1306 (Colo. App. 1998) (no fiduciary relationship existed between tenants in common absent evidence that one party reposed special confidence in the other); **Vikell Investors Pacific, Inc. v. Kip Hampden, Ltd.**, 946 P.2d 589 (Colo. App. 1997) (no fiduciary relationship between owner of apartment buildings and engineer who worked on project to stabilize buildings); **Winkler v. Rocky Mountain Conference of United Methodist Church**, 923 P.2d 152 (Colo. App. 1995) (pastor who counseled parishioner on personal matters had fiduciary relationship with parishioner); **Johnston v. CIGNA Corp.**, 916 P.2d 643 (Colo. App. 1996) (investment advisor owes fiduciary duty to customers); **Emenyonu v. State Farm Fire & Casualty Co.**, 885 P.2d 320 (Colo. App. 1994) (contractual relationship between insurer and its insured does not give rise to fiduciary relationship with respect to first-party disputes); **Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.**, 872 P.2d 1359 (Colo. App. 1994) (no fiduciary relationship between borrower and lender where borrower did not repose special trust in lender or relax care and vigilance that borrower would ordinarily have exercised); **Bock v. Brody**, 870 P.2d 530 (Colo. App. 1993) (evidence of close business and personal relationship, without more, is insufficient to establish fiduciary relationship), *aff'd in part, rev'd in part on other grounds*, 897 P.2d 769 (Colo. 1995); **Jarnagin v. Busby, Inc.**, 867 P.2d 63 (Colo. App. 1993) (no fiduciary relationship between parties where there was no evidence that plaintiff reasonably reposed trust and confidence in defendant); **Graphic Directions, Inc.**, 862 P.2d at 1023 (art director of graphics business owed fiduciary duty to employer); **Nicholson v. Ash**, 800 P.2d 1352 (Colo. App. 1990) (evidence was insufficient to establish fiduciary relationship where no confidential relationship existed between parties prior to date of business transaction that gave rise to claim); **First National Bank v. Theos**, 794 P.2d 1055

(Colo. App. 1990) (trial court erred in failing to instruct jury that to establish fiduciary relationship between bank and borrower, borrower had to show that he justifiably reposed a special trust or confidence in bank to act in borrower's best interest, that bank either invited, ostensibly accepted or acquiesced in such trust, and that bank assumed duty to act in borrower's interest with respect to subject matter of trust); **Rubenstein v. South Denver National Bank**, 762 P.2d 755 (Colo. App. 1988) (trial court erred in entering summary judgment dismissing plaintiff's claim against bank for breach of fiduciary duty since there were controverted issues of material fact regarding the existence of fiduciary relationship); **Dolton v. Capitol Federal Savings & Loan Ass'n**, 642 P.2d 21 (Colo. App. 1981) (same); and **Breeden v. Dailey**, 40 Colo. App. 70, 574 P.2d 508 (1977) (where employment agreement gave defendant the power to make financial commitments in unlimited amounts on plaintiff's behalf and without prior approval, fiduciary relationship existed between the parties as a matter of law). *See also* **Circle T Corp. v. Deerfield**, 166 Colo. 238, 444 P.2d 404 (1968); **Alexander Co. v. Packard**, 754 P.2d 780 (Colo. App. 1988); **Meyer v. Schwartz**, 638 P.2d 821 (Colo. App. 1981).

## 26:3 FIDUCIARY RELATIONSHIP ARISING OUT OF A CONFIDENTIAL RELATIONSHIP

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of breach of a fiduciary duty arising from a confidential relationship, you must find that all the following have been proved by a preponderance of the evidence:

1. The plaintiff had a confidential relationship with the defendant;

2. [The plaintiff justifiably placed trust and confidence in the defendant], [The defendant invited, accepted or appeared to accept, or acquiesced in the plaintiff's trust and confidence];

3. The defendant assumed a duty to represent the plaintiff's interest in the subject of the transaction;

4. The duty that arose by reason of the confidential relationship between the plaintiff and the defendant applied to (*insert appropriate description of subject matter of the suit*); and

5. The defendant violated that duty, causing damage to the plaintiff.

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of the affirmative defenses have) been

**proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### **Notes on Use**

1. This instruction should be given with Instruction 26:4.
2. In paragraph 2 of the instruction, use all applicable alternate phrases.
3. When, based on undisputed facts, the court determines as a matter of law that the defendant was acting as a fiduciary for the plaintiff with respect to the subject matter of the suit, the jury should be instructed that the court has determined that a fiduciary relationship existed between the parties, and the first sentence of Instruction 26:2, rather than this instruction should be used. Also, Instruction 26:2 should be used, rather than this instruction, when the claimed fiduciary duty is based on a relationship that is recognized, as a matter of law, as being a fiduciary relationship, such as exists between agent and principal, partners, joint venturers, or attorney and client. *See* Chapter 7 of these instructions.
4. In all cases involving a fiduciary relationship arising out of a confidential relationship, the elements of this instruction must be proven by the plaintiff. However, because fiduciary relationships have been found to arise in diverse situations, the court may need to consider the adequacy of this instruction in light of the particular facts of the case, and this instruction may need to be appropriately modified or supplemented to better reflect the law applicable to specific factual situations.

#### **Source and Authority**

1. This instruction is supported by **First National Bank v. Theos**, 794 P.2d 1055 (Colo. App. 1990). *See also* **Jarnagin v. Busby, Inc.**, 867 P.2d 63 (Colo. App. 1993).
2. A fiduciary duty may arise out of a confidential relationship. **Rubenstein v. S. Denver Nat'l Bank**, 762 P.2d 755 (Colo. App. 1988); **Dolton v. Capitol Fed. Sav. & Loan Ass'n**, 642 P.2d 21 (Colo. App. 1981). However, the existence of a confidential relationship, without more, is insufficient to establish a fiduciary duty. **Bock v. Brody**, 870 P.2d 530 (Colo. App. 1993), *aff'd in part, rev'd in part on other grounds*,

897 P.2d 769 (Colo. 1995); **Theos**, 794 P.2d at 1061. Moreover, under Colorado law, there is no separate tort for breach of a confidential relationship. **Bock**, 870 P.2d at 533; **Todd Holding Co. v. Super Valu Stores, Inc.**, 874 P.2d 402 (Colo. App. 1993); *see also* **Smith v. TCI Commc'ns, Inc.**, 981 P.2d 690 (Colo. App. 1999) (recognizing that confidential relationship may give rise to fiduciary duty, but holding that no such duty existed where confidential relationship did not exist prior to transaction giving rise to claim).

3. A fiduciary duty has been found where one party occupied a superior position over the other and, thus, was in a position to influence or affect the interests of the other. **Moses v. Diocese of Colo.**, 863 P.2d 310 (Colo. 1993); *see also* **In the Interest of Delluomo v. Cedarblade**, 2014 COA 43, ¶ 27, 328 P.3d 291, 296 (“A trustee’s duty springs from the underlying legal agreement to manage property and is bounded by the scope of that relationship; in contrast, the duty of a confidential relation arises from superiority and influence, is borne by the individual, is not expressly agreed upon, and involves property only incidentally.”). A fiduciary duty has been found where one person has practical control over the affairs of another. **Paine, Webber, Jackson & Curtis, Inc. v. Adams**, 718 P.2d 508 (Colo. 1986). A fiduciary duty may arise from a business or confidential relationship that compels or induces one party to relax the care and vigilance one would ordinarily exercise in dealing with a stranger. **Dolton**, 642 P.2d at 23. A fiduciary relationship can arise out of a relationship of blood, business, friendship, or other association. **Moses**, 863 P.2d at 322.

## 26:4 CONFIDENTIAL RELATIONSHIP—DEFINED

A confidential relationship exists between parties to a transaction if the parties' relationship is such that one is induced to relax the care and vigilance one ordinarily would exercise in dealing with a stranger.

### Notes on Use

1. When instructing a jury on the definition of a confidential relationship in a will contest, Instruction 34:18 should be used, rather than this instruction.

2. The existence of a confidential relationship is not sufficient in and of itself to establish a breach of fiduciary duty. **First Nat'l Bank v. Theos**, 794 P.2d 1055 (Colo. App. 1990). Accordingly, this instruction should be given with Instruction 26:3.

### Source and Authority

1. This instruction is supported by **Jarnagin v. Busby, Inc.**, 867 P.2d 63 (Colo. App. 1993). *See also* **Turkey Creek, LLC v. Rosania**, 953 P.2d 1306 (Colo. App. 1998); **Vikell Inv'rs Pac., Inc. v. Kip Hampden, Ltd.**, 946 P.2d 589 (Colo. App. 1997); **Nicholson v. Ash**, 800 P.2d 1352 (Colo. App. 1990); **Dolton v. Capital Fed. Sav. & Loan Ass'n**, 642 P.2d 21 (Colo. App. 1981); *accord* **United Fire & Cas. Co. v. Nissan Motor Corp.**, 164 Colo. 42, 44, 433 P.2d 769, 771 (1967) (concluding that no fiduciary relationship existed between plaintiff and defendant in the absence of any showing of a relationship "which might have impelled or induced [plaintiff] to relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger").

2. A confidential relationship may also arise if: (1) one party has taken steps to induce another to believe that it can safely rely on the first party's judgment or advice; or (2) one person has gained the confidence of the other and purports to act or advise with the other's interest in mind. **Theos**, 794 P.2d at 1061 (citing RESTATEMENT (SECOND) OF CONTRACTS § 161d cmt. f (1982); RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (1959)); *see also* **In re Marriage of Page**, 70 P.3d 579 (Colo. App. 2003) (following **Theos**).

3. A confidential relationship may arise from a multitude of different circumstances. **Nicholson**, 800 P.2d at 1355; *see also* **Lewis v. Lewis**, 189 P.3d 1134 (Colo. 2008) (discussing the nature of a confidential relationship in the context of a claim for unjust enrichment and stating that a confidential relationship may serve as an indication of fiduciary status).

## 26:5 ACTUAL DAMAGES

Plaintiff, *(name)*, has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the breach of fiduciary duty by the defendant(s), *(name[s])*, (and the *[insert appropriate description, e.g., "negligence"]*, if any, of any designated nonparties).

In determining such damages, you shall consider the following:

1. Any noneconomic losses or injuries which plaintiff has had or will probably have in the future, including: *[insert any recoverable noneconomic losses for which there is sufficient evidence]*; and

2. Any economic losses which plaintiff has had or will probably have in the future, including:

(a. Anything of value or any profit the defendant, *[name]*, received as a result of the breach of fiduciary duty);

(b. Any loss of the plaintiff's property or assets caused by the breach of the fiduciary duty);

(c. Any loss of [profits] [or] [income] which plaintiff could reasonably have expected to earn had the fiduciary duty not been breached);

(d. Any [loss] [damage] which plaintiff has had as a result of a third person making a claim against [him] [her] because of the breach of fiduciary duty); and

(e. *[insert any other recoverable economic losses for which there is sufficient evidence]*).

### Notes on Use

1. The amount of damages sought should not be stated in this instruction or in the statement of the case. **Rodrigue v. Hausman**, 33 Colo. App. 305, 519 P.2d 1216 (1974).

2. This instruction should be used in conjunction with Instruction 26:1.

3. Only those parenthesized numbered paragraphs and lettered subparagraphs should be given as are appropriate in light of the evidence in the case.

### Source and Authority

1. This instruction is supported by **Buder v. Sartore**, 774 P.2d 1383 (Colo. 1989) (subparagraphs a, b, and c); **Rupert v. Clayton Brokerage Co.**, 737 P.2d 1106 (Colo. 1987) (subparagraph b); **Elijah v. Fender**, 674 P.2d 946 (Colo. 1984) (subparagraphs b and d); **McKinney v. Christmas**, 143 Colo. 361, 353 P.2d 373 (1960); **Murphy v. Central Bank & Trust Co.**, 699 P.2d 13 (Colo. App. 1985); **Commercial Union Insurance Co.**, 698 P.2d 1388 (Colo. App. 1985) (subparagraph d), *aff'd on other grounds*, 739 P.2d 239 (Colo. 1987); **White v. Brock**, 41 Colo. App. 156, 584 P.2d 1224 (1978); **Lestoque v. M. R. Mansfield Realty, Inc.**, 36 Colo. App. 32, 536 P.2d 1146 (1975); and RESTATEMENT (SECOND) OF AGENCY § 401 (1958). *See also* **Paine, Webber, Jackson & Curtis, Inc. v. Adams**, 718 P.2d 508 (Colo. 1986); **Life Care Ctrs. of Am., Inc. v. E. Hampden Assocs. Ltd. P'ship**, 903 P.2d 1180 (Colo. App. 1995) (loss of future profits); **Graphic Directions, Inc. v. Bush**, 862 P.2d 1020 (Colo. App. 1993) (evidence insufficient to sustain award of damages for lost profits).

2. For other cases discussing damages for breach of a fiduciary duty, see **Genova v. Longs Peak Emergency Physicians, P.C.**, 72 P.3d 454 (Colo. App. 2003) (where the only kind of economic damages that plaintiff could have sustained as a result of defendants' breach of fiduciary duty were damages for loss of future earnings, trial court did not err in refusing to instruct on damages for loss of assets or property); **T-A-L-L, Inc. v. Moore & Co.**, 765 P.2d 1039 (Colo. App. 1988) (seller entitled to return, on theory of unjust enrichment, of commission paid real estate broker who had breached duty of loyalty), *aff'd in part, rev'd in part on other grounds*, 792 P.2d 794 (Colo. 1990); **Collie v. Becknell**, 762 P.2d 727 (Colo. App. 1988).

3. When otherwise appropriate to the evidence in the case, punitive damages may also be recoverable in a case based on a claim for relief for breach of a fiduciary duty. **Mahoney Mktg. Corp. v. Sentry Builders**, 697 P.2d 1139 (Colo. App. 1985); **White v. Brock**, 41 Colo. App. 156, 584 P.2d 1224 (1978). *But see* **Kaitz v. Dist. Court**, 650 P.2d 553 (Colo. 1982) (punitive damages not recoverable when plaintiff's claim is equitable rather than legal).

4. Attorney fees may be recovered as an exception to the “American Rule” only in breach of trust actions or breach of fiduciary duty actions that are closely analogous to breach of trust actions. *See Interest of Delluomo v. Cedarblade*, 2014 COA 43, ¶ 9, 328 P.3d 291; *see also Taylor v. Taylor*, 2016 COA 100, ¶¶ 32–35, 381 P.3d 428 (holding that an award of attorney fees to settlor’s children against trustee was proper under breach of trust exception to American Rule in accordance with *Delluomo* where jury determined that defendant had breached a fiduciary duty to settlor, the defendant was a trustee, and trustee and his siblings stood to personally gain from his breach of fiduciary duty).

5. Comparative negligence is not available as a defense to an intentional tort claim. *Carman v. Heber*, 43 Colo. App. 5, 601 P.2d 646 (1979). *See also Winkler v. Rocky Mountain Conference of the United Methodist Church*, 923 P.2d 152 (Colo. App. 1995) (holding that trial court did not err in failing to instruct the jury on comparative negligence with respect to plaintiff’s claim for breach of fiduciary duty because even assuming that comparative negligence principles may apply to a claim for breach of fiduciary duty there was no evidence which would support a finding that plaintiff was at fault or had knowledge of the danger to which she was exposed, consented to that danger, and assumed the risk); *Van Schaack v. Van Schaack Holdings, Ltd.*, 856 P.2d 15 (Colo. App. 1992) (trial court did not err in refusing to instruct the jury on comparative negligence in conjunction with plaintiff’s breach of fiduciary duty claim because plaintiff’s actions could not have affected the jury’s determination as to whether defendants had breached their fiduciary duty to her as a shareholder).

6. When a fiduciary duty arises from a contract, the economic loss rule applies, such that a breach of a fiduciary duty cannot serve as the basis of a tort claim seeking additional compensation for an alleged failure to perform a contractual obligation. *Casey v. Colo. Higher Educ. Ins. Benefits All. Tr.*, 2012 COA 134, ¶ 30, 310 P.3d 196; *A Good Time Rental, LLC v. First Am. Title Agency, Inc.*, 259 P.3d 534 (Colo. App. 2011).

7. The general rule is that an employee is not entitled to any compensation for services performed during a period in which he engaged in activities constituting a breach of his duty of loyalty, even though part of those services may have been properly performed. The employee is, however, entitled to compensation for services properly performed during periods in which no such breach occurred. *Koontz v. Rosener*, 787 P.2d 192 (Colo. App. 1989).

## CHAPTER 27. CIVIL CONSPIRACY

27:1 Elements of Liability

27:2 Unlawful Means—Defined

27:3 Unlawful Goal—Defined

### 27:1 ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant(s) (*name[s]*), on (his) (her) claim of civil conspiracy, you must find that all of the following have been proved by a preponderance of the evidence:

1. The defendant(s) (and at least one other person) agreed, by words or conduct, to (accomplish an unlawful goal) (or) (accomplish a goal through unlawful means);

2. (One or more unlawful acts were performed to accomplish the goal) (or) (one or more acts were performed to accomplish the unlawful goal);

3. The plaintiff had (injuries) (damages) (losses); and

4. The plaintiff's (injuries) (damages) (losses) were caused by the acts performed to accomplish the goal.

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant(s).

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any

one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. Omit any numbered paragraph, the facts of which are not in dispute.

2. If the defendant has put no affirmative defense in issue or there is insufficient evidence to support a defense, the last two paragraphs should be omitted.

3. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

4. Other appropriate instructions defining the terms used in this instruction must also be given with this instruction, in particular an instruction or instructions relating to causation. *See* Instructions 9:18 to 9:21.

5. For the definition of “unlawful means,” *see* Instruction 27:2 and for the definition of “unlawful goal,” *see* Instruction 27:3.

#### Source and Authority

1. This instruction is supported by **Jet Courier Service, Inc. v. Mulei**, 771 P.2d 486 (Colo. 1989); **Nelson v. Elway**, 908 P.2d 102 (Colo. 1995) (unlawful overt act not established); **Contract Maintenance Co. v. Local No. 105**, 160 Colo. 190, 415 P.2d 855 (1966); **Lockwood Grader Corp. v. Bockhaus**, 129 Colo. 339, 270 P.2d 193 (1954); **Walker v. Van Laningham**, 148 P.3d 391 (Colo. App. 2006); **Stauffer v. Stegemann**, 165 P.3d 713 (Colo. App. 2006); **Telluride Real Estate Co. v. Penthouse Affiliates, L.L.C.**, 996 P.2d 151 (Colo. App. 1999); **Magin v. DVCO Fuel Systems, Inc.**, 981 P.2d 673 (Colo. App. 1999); and **Electrolux Corp. v. Lawson**, 654 P.2d 340 (Colo. App. 1982).

2. The cases require an overt act, but do not suggest that an affirmative act covertly done does not constitute an “overt” act. A bad

thought does not in itself suffice. The word “overt” has not been used in this instruction because that requirement is covered by the word “performed” in the second numbered paragraph.

3. Personal jurisdiction in Colorado for civil conspiracy requires an act by a Colorado resident co-conspirator before the Court could potentially have personal jurisdiction over foreign co-conspirator defendants. **Giduck v. Niblett**, 2014 COA 86, ¶ 25, 408 P.3d 856 (reserving for another day the question of whether a civil conspiracy could potentially establish personal jurisdiction in Colorado).

4. A claim for damages arising from a civil conspiracy may be pled as a separate claim, and liability may be imposed on a single defendant for conspiratorial acts with others who have not been joined in the action. In such a case, liability may be imposed upon a defendant for the fault of all other joint tortfeasors, regardless of whether they have settled with the plaintiff and not been joined in the action. **Pierce v. Wiglesworth**, 903 P.2d 656 (Colo. App. 1994).

5. To establish a claim for civil conspiracy, an express agreement is not necessary. However, there must be some indicia of an agreement. **Saint John’s Church v. Scott**, 194 P.3d 475 (Colo. App. 2008) (evidence of conspiracy to commit a public nuisance sufficient where two defendants were part of a small group with a long history of active demonstrations, both made plans to attend protest, both met with protest group about the demonstration, and one provided the other with signs for protest); **Double Oak Constr., L.L.C. v. Cornerstone Dev. Int’l, L.L.C.**, 97 P.3d 140 (Colo. App. 2003) (fraudulent conveyance); **Schneider v. Midtown Motor Co.**, 854 P.2d 1322 (Colo. App. 1992).

6. A claim for civil conspiracy is a derivative cause of action; therefore, if the acts constituting the underlying wrong do not provide the basis for an independent cause of action, there is no cause of action for the conspiracy itself. **Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1**, 2018 COA 92, ¶ 55 (“Given our conclusions that the [contract] is void and that there was no tortious interference, no unlawful overt act arguably supports Falcon’s civil conspiracy claim.”); **Double Oak Constr., L.L.C.**, 97 P.3d at 146; **Condo v. Conners**, 271 P.3d 524 (Colo. App. 2010) (absent evidence of tortious interference with contract, there was no unlawful overt act to support a claim of civil conspiracy), *aff’d*, 266 P.3d 1110 (Colo. 2011).

7. Courts have generally held that an attorney acting within the scope of his employment cannot conspire with his client unless the attorney has also acted for his sole personal benefit. However, other courts have recognized additional bases for a viable civil conspiracy claim, such as when an attorney engages in fraud or breaches an independent duty to a third person. **Semler v. Hellerstein**, 2016 COA 143, ¶ 32, 428 P.3d 555, 563 (affirming dismissal of civil conspiracy claim because the plaintiff failed to allege that the defendant lawyer “acted for his

own personal gain or otherwise acted outside the scope of his legal representation”), *rev’d on other grounds sub nom. Bewley v. Semler*, 2018 CO 79, 432 P.3d 582.

8. Section 13-21-111.5(4), C.R.S., provides that defendants who consciously conspire and deliberately pursue a common plan or design to commit a tortious act shall be jointly liable to a plaintiff, rather than only individually liable for their proportion of personal fault. Section 13-21-111.5(4), however, does not list all of the elements of the independent tort of civil conspiracy. **Resolution Tr. Corp. v. Heiserman**, 898 P.2d 1049 (Colo. 1995). The statutory term “tortious act” includes any conduct other than breach of contract that constitutes a civil wrong and causes injury or damages. *Id.*

**27:2 UNLAWFUL MEANS—DEFINED**

**“Unlawful means” (are) (include)** *(insert an appropriate description of the specific acts the plaintiff alleges were used to accomplish the conspiracy of which there is sufficient evidence and which would be unlawful under the applicable law).*

**The fact that this definition of “unlawful means” is being given to you does not mean that the court is instructing you to find that unlawful means were used. The question of whether or not such means were used is a question of fact for you to determine.**

**Notes on Use**

1. This instruction must be given whenever the phrase “unlawful means” is included in Instruction 27:1.
2. What constitutes “unlawful means” is a question of law for the court.

**Source and Authority**

1. No Colorado decision provides a comprehensive definition of “unlawful means.” Several cases, however, have held specific acts, such as a breach of a duty of loyalty, to be “unlawful.” **Jet Courier Serv., Inc. v. Mulei**, 771 P.2d 486 (Colo. 1989); *see also* **Espinoza v. O'Dell**, 633 P.2d 455 (Colo. 1981) (interference or violation of civil rights); **Julius Hyman & Co. v. Velsicol Corp.**, 123 Colo. 563, 233 P.2d 977 (1951) (wrongful use of trade secrets); **Zimmerman v. Hinderlinder**, 112 Colo. 277, 148 P.2d 813 (1944) (destruction of decreed reservoir rights).
2. An alleged conspiracy to defraud, cheat, and wrong the plaintiff by procuring a judgment was held to state a cause of action in **Dixon v. Bowen**, 85 Colo. 194, 274 P. 824 (1929), as was a conspiracy to cancel a corporation's contracts and deplete the corporation's assets in **Schreiber v. Burton**, 81 Colo. 370, 256 P. 1 (1927). *See also* **Schneider v. Midtown Motor Co.**, 854 P.2d 1322 (Colo. App. 1992) (tort of “negligent entrustment”).

## 27:3 UNLAWFUL GOAL—DEFINED

**“Unlawful goal” means** *(insert an appropriate description of the goal of the alleged conspiracy of which there is sufficient evidence and which would be unlawful under the applicable law).*

The fact that this definition of “unlawful goal” is being given to you does not mean the court is instructing you to find that the defendant(s) sought to accomplish an unlawful goal. The question of whether the defendant(s) sought to accomplish such a goal is a question of fact for you to determine.

### Notes on Use

1. This instruction must be given whenever the phrase “unlawful goal” is included in Instruction 27:1.
2. What constitutes an “unlawful goal” is a question of law for the court.

### Source and Authority

No Colorado decision provides a comprehensive definition of “unlawful goal.” For an indication of various goals which have been considered unlawful, however, see the cases cited in the Source and Authority to Instruction 27:2.

## CHAPTER 28. INVASION OF PRIVACY

- 28:1 Invasion of Privacy by Intrusion—Elements of Liability
- 28:2 Intrusion—Very Offensive to a Reasonable Person—Defined
- 28:3 Intentional Intrusion—Defined
- 28:4 Invasion of Privacy by Appropriation—Elements of Liability
- 28:5 Invasion of Privacy by Public Disclosure of Private Facts—Elements of Liability
- 28:6 Public Statement or Disclosure—Defined
- 28:7 About the Plaintiff—Defined
- 28:8 Private Facts—Defined
- 28:9 Public Disclosure of Private Facts—Very Offensive to a Reasonable Person—Defined
- 28:10 Invasion of Privacy by Publicity Placing Plaintiff in a False Light
- 28:11 Invasion of Privacy—Affirmative Defense—Privilege
- 28:12 Invasion of Privacy—Affirmative Defense—Statute of Limitations
- 28:13 Invasion of Privacy—Affirmative Defense—Consent
- 28:14 Invasion of Privacy—Damages
- 28:15 Invasion of Privacy—Exemplary or Punitive Damages

### 28:1 INVASION OF PRIVACY BY INTRUSION—ELEMENTS OF LIABILITY

**For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of invasion of privacy by intrusion, you must find all the following have been proved by a preponderance of the evidence:**

**1. The defendant intentionally invaded the plaintiff's privacy by (*insert description of act(s) alleged to constitute intrusion*);**

**2. The invasion would be very offensive to a reasonable person;**

**3. The plaintiff had (injuries) (damages) (losses); and**

**4. The invasion was a cause of the plaintiff's (injuries) (damages) (losses).**

**If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.**

**On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to the plaintiff's claim*]).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### **Notes on Use**

1. Omit any numbered paragraph, the facts of which are not in dispute.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see Notes on Use to Instruction 4:20.

3. If the defendant has put no affirmative defense in issue, or there is insufficient evidence to support a defense, the last two paragraphs should be omitted.

4. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

5. Other instructions defining terms used in this instruction, such

as Instructions 28:2, defining “very offensive to a reasonable person,” 28:3, defining “intentional,” and 9:18 to 9:21, relating to causation, should be given with this instruction.

6. The right of privacy has been defined as “the right to be let alone,” and the invasion of privacy torts are concerned primarily with redress for injury to feelings caused by invasions of that right. RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (1977). The tort of invasion of the right of privacy has been divided into four forms: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the name or likeness of another; (3) unreasonable publicity given to another’s private life; and (4) publicity that unreasonably places another in a false light before the public. *Id.* For instructions dealing with forms (2), (3), and (4), see Instructions 28:4, 28:5, and 28:10, respectively. Colorado does not recognize the tort of “false light” invasion of privacy. See Instruction 28:10.

### Source and Authority

1. This instruction is supported by **Rugg v. McCarty**, 173 Colo. 170, 476 P.2d 753 (1970); and **Pearson v. Kancilia**, 70 P.3d 594 (Colo. App. 2003) (evidence that plaintiff was subjected to unwanted sexual advances and contact by her employer, including early morning visits to plaintiff’s apartment, was sufficient to support claim for invasion of privacy by intrusion). See also **Doe v. High-Tech Inst., Inc.**, 972 P.2d 1060 (Colo. App. 1998); RESTATEMENT § 652B.

2. Suits for invasion of privacy can be brought only by individuals. Corporations, associations, and partnerships may not recover for an invasion of privacy because they have no personal rights of privacy. RESTATEMENT § 652I cmt. c (1977). Except for the tort of invasion of privacy by appropriation, the right is personal, and cannot be assigned. RESTATEMENT §§ 652C, 652I; see also **McKenna v. Oliver**, 159 P.3d 697 (Colo. App. 2006). There is no Colorado decision and a split of authority in other jurisdictions as to whether an unaccrued right for appropriation survives the death of the individual. See RESTATEMENT § 652I cmt. b; see also 2 J. MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 9:5 (2d ed. 2018). There is no vicarious right of privacy extending to family or associates of the person whose privacy has been invaded; only the person referred to may maintain the action. 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 12:3.3 (5th ed. 2019).

3. The Colorado Supreme Court first recognized the tort of invasion of privacy in **Rugg**, 173 Colo. at 174, 476 P.2d at 754. **Rugg** involved circumstances that implicate invasion of privacy by intrusion, and the court declined “comprehensively [to] define the right of privacy, [or] to categorize the character of all invasions which may constitute a violation of such right.” *Id.* at 175, 476 P.2d at 755. In **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997), the court acknowledged the four theories and adopted the tort of public disclosure of private facts. In **Joe Dickerson & Assocs., LLC v. Dittmar**, 34 P.3d 995, 999 (Colo.

2001), the supreme court acknowledged that “[w]hile the exact parameters of [the] tort of invasion of privacy by appropriation of identity vary from state to state, it has always been clear that a plaintiff could recover for personal injuries such as mental anguish and injured feelings resulting from an appropriation.” The court declined to recognize the false light theory in **Denver Publishing Co. v. Bueno**, 54 P.3d 893 (Colo. 2002).

4. Invasion of privacy by intrusion does not require physical intrusion, publicity, or general communication to the public. *See Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060 (Colo. App. 1998); RESTATEMENT § 652B cmt. a. The gist of the tort is interference with the plaintiff’s solitude, seclusion, or private affairs and concerns, and this can occur by an unauthorized entry to the plaintiff’s premises, electronic eavesdropping, unauthorized opening of the plaintiff’s mail, or repeated hounding and harassment. *Id.* cmt. b. The testing of bodily fluids without proper consent may also be an invasion of privacy. *Doe*, 972 P.2d at 1068. The intrusion into the plaintiff’s privacy requires intentional rather than merely reckless conduct. **Fire Ins. Exch. v. Sullivan**, 224 P.3d 348 (Colo. App. 2009).

5. A private cause of action exists under federal law for illegal wiretapping, *see* 18 U.S.C. § 2520 (2018), except where one party to the conversation consented to the interception, *see* 18 U.S.C. § 2511(2)(d) (2018). Colorado’s criminal law prohibiting wiretapping similarly exempts from liability any interception of an aural communication where the sender or receiver consented to the recording. *See* § 18-9-303(1)(a), C.R.S. No Colorado court has yet recognized an implied private cause of action under the Colorado anti-wiretapping statute.

6. For statutory actions for wrongful debt collection practices, *see* section 5-16-113, C.R.S.

7. Privacy claims for intrusions by governmental regulation in areas of personal choice that are protected by the Constitution are beyond the scope of this chapter. *See* 1 J. MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:56 (2d ed. 2018). Also, actions against governmental agencies or authorities in violation of privacy rights protected by the Fourth Amendment are not treated in this chapter.

8. There is no liability for examining public records or other information that is properly available for public inspection, or for observing or photographing a person in a public place. RESTATEMENT § 652B cmt. c.

9. Where the alleged intrusion is an entry onto private property, a plaintiff must demonstrate a “possessory or proprietary” interest in the property. **Sundheim v. Bd. of Cty. Comm’rs**, 904 P.2d 1337 (Colo. App. 1995), *aff’d on other grounds*, 926 P.2d 545 (Colo. 1996) (plaintiff who leased property to business tenant lacks standing to assert privacy right invaded by an intrusion on the property). “[W]hen an intrusion into a commercial establishment is based upon the nature of the busi-

ness activities there taking place,” there may be no actionable intrusion. *Id.* at 1351. Observation and photographs of plaintiff’s premises from a vantage point outside the perimeter of the property is not an intrusion, and neither is the use of lenses to enhance the view of what is readily visible. *Id.*

10. In **Rugg**, 173 Colo. at 176, 476 P.2d at 755, the court observed that “reasonable” debt collection practices “may result to a certain degree in the invasion of the debtor’s right of privacy” and emphasized that an actionable invasion of privacy occurs only “when unreasonable action in pursuing a debtor is taken, which foreseeably will probably result in extreme mental anguish, embarrassment, humiliation or mental suffering and injury to a person possessed of ordinary sensibilities, under the same or similar circumstances.” It appears that this language was intended to define the scope of conduct that is unreasonably intrusive and, therefore, actionable. It may be that this language was intended to impose a requirement that the plaintiff suffer “extreme mental anguish,” but the court has not declared this an element of the tort.

11. There are no Colorado appellate court cases, and there is divided authority in other jurisdictions, as to whether the plaintiff may recover for injury resulting from the publication of information obtained through an actionable intrusion when the publication itself would not be actionable. **SACK ON DEFAMATION**, *supra*, at § 12:6. The Tenth Circuit has predicted that Colorado courts will answer the question in the negative. **Quigley v. Rosenthal**, 327 F.3d 1044 (10th Cir. 2003).

## 28:2 INTRUSION—VERY OFFENSIVE TO A REASONABLE PERSON—DEFINED

In determining whether an invasion is very offensive to a reasonable person, you should consider all of the evidence, including the degree of invasion, the circumstances surrounding the intrusion and the manner in which it occurred, the defendant's motives and objectives, the setting in which the intrusion occurs, and the plaintiff's expectations of privacy in that setting.

The right of privacy does not protect people from minor annoyance, indignities, or insults, or the normal, expected contacts with and exposure to life in a modern society.

### Notes on Use

The First Amendment to the Constitution of the United States creates no privilege for journalists to commit an intrusion in the course of gathering news; however, the purpose of the defendant in seeking information may be relevant to whether the intrusion would be "highly offensive to a reasonable person." See 1 ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* § 12:6 (5th ed. 2019).

### Source and Authority

This instruction is supported by *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970); and *Pearson v. Kancilia*, 70 P.3d 594 (Colo. App. 2003) (evidence that plaintiff was subjected to unwanted sexual advances and contact by her employer, including early morning visits to plaintiff's apartment, was sufficient to support claim for invasion of privacy by intrusion). See also *Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060 (Colo. App. 1998); RESTATEMENT (SECOND) OF TORTS § 652B (1977); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 117, at 854–56 (5th ed. 1984).

**28:3 INTENTIONAL INTRUSION—DEFINED**

**A defendant intends to invade the plaintiff's privacy when (he) (she) (it) means to invade the plaintiff's privacy, or knows that (his) (her) (its) conduct will almost certainly cause an invasion of privacy.**

**Notes on Use**

The element of intent may also require that the defendant have knowledge to a substantial certainty that he lacks permission or consent to commit the intrusive act. 1 J. MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5:89 (2d ed. 2018); *see also* **Zacchini v. Scripps-Howard Broad. Co.**, 433 U.S. 562 (1977).

**Source and Authority**

This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 8A (1965).

## 28:4 INVASION OF PRIVACY BY APPROPRIATION—ELEMENTS OF LIABILITY

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) claim of invasion of privacy by improper use of plaintiff's *(name)* (likeness) (or) (identity), you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant used the plaintiff's *(name)* (likeness) (or) (identity);
2. The use of the plaintiff's *(name)* (likeness) (or) (identity) was for the defendant's own purposes or benefit, commercially or otherwise;
3. The plaintiff had (damages) (injuries) (losses); and
4. The defendant's use of the plaintiff's *(name)* (likeness) (or) (identity) was a cause of the plaintiff's (damages) (injuries) (losses).

If you find that any one or more of these *(number)* statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to the plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have)

**been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. Omit any numbered paragraph, the facts of which are not in dispute.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. If the defendant has put no affirmative defense in issue, or there is insufficient evidence to support a defense, the parenthesized portion of the last two paragraphs should be omitted.

4. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraph of this instruction. Instead, Instruction 5:2 should be given along with the damages instruction appropriate to the claim and the evidence in the case.

5. Other appropriate instructions, including Instructions 9:18 to 9:21, relating to causation, should also be given with this instruction.

6. For a use of the plaintiff's name or likeness to be an appropriation, the plaintiff must be identifiable as the person who is the subject of the defendant's communication. When identifiability is in issue, a separate instruction must be given. *See* 1 J. McCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 3:4 (2d ed. 2018).

8. The extent to which constitutional limits may apply to the privacy torts that involve publication but not falsity (namely, appropriation and public disclosure of private facts) has not yet been determined. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977); RESTATEMENT (SECOND) OF TORTS §§ 564 cmts. f & g, 580A cmts. d & i, 580B cmt. d (1977). If the court determines that intent or fault in some form is required, or that the plaintiff has the burden of proving that the use was unauthorized, this instruction must be modified accordingly.

### Source and Authority

1. This instruction is supported by **Joe Dickerson & Assocs., LLC v. Dittmar**, 34 P.3d 995 (Colo. 2001); RESTATEMENT (SECOND) OF TORTS § 652C.

2. In **Dittmar**, 34 P.3d at 1002, the Colorado Supreme Court adopted the cause of action of appropriation of name, likeness, or identity, but limited recovery to "personal damages," including mental

anguish and injured feelings. The court did not reach the question whether Colorado would permit recovery for commercial damages related to one's identity or persona, and, if permitted, whether the plaintiff must prove the value of his or her identity to recover such damages. The court did not specify what damages and losses would be included within the term "personal damages," but apparently intended those damages to include emotional injury, harm to reputation and related financial losses, but not damages based upon the commercial value of one's persona. In other jurisdictions, courts have recognized a "right of publicity" against one who appropriates, without consent, the plaintiff's name, likeness or identity, under which commercial damages are recoverable if the plaintiff proves value in his or her identity. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

3. Use of a plaintiff's name, likeness, or identity is privileged under the First Amendment and not actionable when it is "made in the context of, and reasonably relates to, a publication concerning a matter that is newsworthy or of legitimate public concern." **Dittmar**, 34 P.3d at 1003. If the character of the publication is "primarily commercial," the privilege will not apply. *Id.* "Commercial speech is speech that proposes a commercial transaction." *Id.* at 1004. Social or political commentaries, lifestyle features, artistic and entertainment works, including parody and satire, may also be protected as long as they are not predominantly commercial. *See* 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 12:5 (5th ed. 2019). Speech is not commercial simply because it is published by a profitmaking enterprise, such as a newspaper, magazine, or television station. **Dittmar**, 34 P.3d at 1004.

4. The determination of whether the public interest privilege applies is a question of law for the court. **Dittmar**, 34 P.3d at 1003. In making that determination, the court is to consider the content of the speech at issue and not the motivation of the speaker, even if that motive is primarily to promote the defendant's products or services. *Id.*

5. Under the common law of defamation, one who is not an originator of a communication, but is merely its conduit or distributor, cannot be held liable unless the actor knew or should have known of the defamatory nature of the publication. *See* RESTATEMENT (SECOND) OF TORTS §§ 577, 581. The "distributor" doctrine has also been applied in privacy tort cases that do not involve the element of falsity, and it requires that the communicator have knowledge of the actionable character of the communication. RIGHTS OF PUBLICITY AND PRIVACY, *supra*, § 3:17. The "distributor" doctrine has been applied generally to bookstores, magazine stands, libraries, and others. It has been applied also to newspapers when they publish advertisements submitted by others. *See* Instruction 22:24.

**28:5 INVASION OF PRIVACY BY PUBLIC  
DISCLOSURE OF PRIVATE FACTS—  
ELEMENTS OF LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim for invasion of privacy by public disclosure of private facts, you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant made (a) fact(s) about the plaintiff public;
2. Before this disclosure, the (fact was) (facts were) private;
3. A reasonable person would find the disclosure of (that fact) (those facts) very offensive;
4. At the time of the disclosure, the defendant knew or should have known that the fact or facts (he) (she) (it) disclosed were private;
5. The plaintiff had (injuries) (losses) (damages); and
6. The public disclosure of (this fact was) (these facts were) a cause of the plaintiff's (injuries) (losses) (damages).

If you find that any one or more of these (*number*) statements have not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any

one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. Omit any numbered paragraph, the facts of which are not in dispute.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. If the defendant has put no affirmative defense in issue, or there is insufficient evidence to support a defense, the last two paragraphs should be omitted.

4. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this Instruction. Instead, Instruction 5:2 should be given along with the damages instruction appropriate to the claim and the evidence in the case.

5. Other appropriate instructions defining the terms used in this instruction, such as Instructions 28:6 (defining “public”), 28:7 (defining “about the plaintiff”), 28:8 (defining “private facts”), 28:9 (defining “very offensive to a reasonable person”), and Instructions 9:18 to 9:21, relating to causation, should also be given with this instruction.

6. The disclosure must be of a previously private matter, thus excluding information that is already public, available from public records, or that the plaintiff leaves open to the public. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977). Embarrassing and otherwise private facts are not considered private for purposes of the public disclosure tort after they have been disclosed in an arbitration proceeding in which confidentiality was not required by agreement, order, or rule. **A.T. v. State Farm Mut. Auto. Ins. Co.**, 989 P.2d 219 (Colo. App. 1999).

#### Source and Authority

1. This instruction is supported by **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997); and RESTATEMENT § 652D.

2. In **Borquez**, 940 P.2d at 377, the court recognized a tort claim for invasion of privacy by public disclosure of private facts. The following elements must be proved: (1) the fact or facts disclosed must be private in nature; (2) the disclosure must be made to the public; (3) the disclosure must be one which would be highly offensive to a reasonable person; (4) the facts disclosed cannot be of legitimate concern to the public; and (5) the defendant acted with reckless disregard of the private nature of the fact or facts disclosed. *Id.* The court clarified that the public disclosure element requires “communication to the public in general or to a large number of persons, as distinguished from one individual or a few.” *Id.* A person acts with reckless disregard of the private nature of the facts disclosed if the defendant “knew or should have known that the fact or facts disclosed were private in nature.” *Id.* at 379; *see also Fire Ins. Exch. v. Sullivan*, 224 P.3d 348 (Colo. App. 2009).

3. The supreme court also noted that “public disclosure may occur where the defendant merely initiates the process whereby the information is eventually disclosed to a large number of persons.” **Borquez**, 940 P.2d at 377 n.7 (citing **Beaumont v. Brown**, 257 N.W.2d 522 (Mich. 1977)). When the defendant did not actually make the public disclosure, but may nonetheless be held responsible for it, this instruction should be modified accordingly.

4. The fourth element, that the facts disclosed cannot be of legitimate concern to the public, is not covered by this instruction because it appears to be a question of law. The determination of what is a matter of public or general concern in the defamation context is a question of law for the court to decide. **Walker v. Colo. Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975), *overruled on other grounds by Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982). The same legal issue is presented in the privacy context. **Lewis v. McGraw-Hill Broad. Co.**, 832 P.2d 1118 (Colo. App. 1992). The United States Supreme Court has also treated the issue as one of law for the court to decide. *See Connick v. Myers*, 461 U.S. 138 (1983). Thus, if the court determines that the facts disclosed by the defendant(s) touch upon a matter of legitimate public interest or concern, in light of authorities cited below, the statements are immune from liability.

5. Because the “public disclosure” privacy tort challenges the right to disseminate truthful information to the public, it “most directly confront[s] the constitutional freedoms of speech and press.” **Cox Broad. Corp. v. Cohn**, 420 U.S. 469, 489 (1975). Although the United States Supreme Court has not yet determined whether such disclosures may ever be actionable, the Court has indicated that sanctions may not be imposed for disseminating matters of legitimate public interest, and in particular, a party disseminating matters that are contained in a government record available to the public may not be subject to liability. *Id.* at 496. In **Florida Star v. B.J.F.**, 491 U.S. 524 (1989), the Court considered the actionability of publication of the identity of a rape

victim, which the authorities had inadvertently disclosed to the media, contrary to Florida law. In considering the First Amendment implications of civil liability for this publication, the Court held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may be lawfully imposed, if at all, only when narrowly tailored to a state interest of the highest order." *Id.* at 541. Applying this standard, the court concluded that "no such interest is satisfactorily served by imposing liability . . . [on] appellant under the facts of this case." *Id.* The precedent relied upon by the Court in **Florida Star** indicates that to receive First Amendment protection the matter must be of "public significance." *Id.* at 533, 536 (quoting **Smith v. Daily Mail Publ'g Co.**, 443 U.S. 97, 103 (1979)).

6. Although courts recognizing the common-law public disclosure tort have also recognized immunity under the common law for publication of material that is "newsworthy" or of legitimate interest to the public, RESTATEMENT § 652D cmt. d, those have been subsumed by the First Amendment's protection of disclosures that are relevant to a matter of public or general concern. The First Amendment protects disclosures of private facts that are highly offensive to a person of ordinary sensibilities when those facts have "some substantial relevance to a matter of legitimate public interest." **Borquez**, 940 P.2d at 378 (quoting **Gilbert v. Med. Econs. Co.**, 665 F.2d 305, 308 (10th Cir. 1981)). This includes information that would otherwise be private concerning individuals who, voluntarily or not, have become involved in a matter that is the legitimate subject of public interest. RESTATEMENT § 652D cmts. d-f. The topics include homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, death from use of narcotics, a rare disease, the birth of a child to a 12-year-old girl, and many other similar matters of genuine, even if more or less deplorable, popular appeal. *Id.* cmt. g. Disclosing the identities of the individuals involved in such matters is necessary to "obviate any impression that the problems raised in the article are remote or hypothetical." **Gilbert**, 665 F.2d at 308. However, even for those that become involved in such matters, there may be some intimate details of a person's life that the person is entitled to keep private. RESTATEMENT § 652D cmt. h.

7. The scope of a matter of legitimate public concern may include disclosures about members of family of a person involved in a newsworthy matter. RESTATEMENT, § 652D cmt. i. Immune publicity is not limited to news, but also includes matters published for purposes of education, entertainment, or amusement. **Lewis**, 832 P.2d at 1121; RESTATEMENT § 652D cmt. j. A matter of public or general concern does not lose that status due to the passage of time. **Lindemuth v. Jefferson Cty. Sch. Dist. R-1**, 765 P.2d 1057 (Colo. App. 1988); RESTATEMENT § 652D cmt. k.

8. The newsworthiness test used to determine whether the facts disclosed are of legitimate concern to the public "properly restricts li-

ability for public disclosure of private facts to the extreme case, thereby providing the breathing space needed by the press.” **Borquez**, 940 P.2d at 378–79 (quoting **Gilbert**, 665 F.2d at 308).

## 28:6 PUBLIC STATEMENT OR DISCLOSURE— DEFINED

A (fact) (disclosure) (statement) is “public” if it is communicated to the general public. It is also public if it is communicated to a large number of persons. There is no specific number of people that the law considers to be a large number; you must consider the particular circumstances in determining whether the disclosure is sufficiently public to be an invasion of privacy. In making that determination, you may consider, in addition to the number of persons to whom the disclosure was made, *(insert description of circumstances that the court has determined are relevant to the determination of what constitutes a large number of people)*.

### Notes on Use

1. The torts of invasion of privacy by public disclosure of private facts and by placing the plaintiff in a false light before the public each require “publicity.” RESTATEMENT (SECOND) OF TORTS §§ 652D cmt. a, 652E cmt. a (1977); 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 12:3.1 (5th ed. 2019). “Publicity” means more than “publication” in the defamation sense, and disclosure to one person or a small group is not sufficient. **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997). In **Borquez**, the court stated that “there is no threshold number which constitutes a large number of persons. Rather the facts and circumstances of a particular case must be taken into consideration in determining whether the disclosure was sufficiently public so as to support a claim for invasion of privacy.” *Id.* at 378.

2. There are no decisions indicating under what circumstances the determination as to whether a disclosure is “public” or made to a “large number of persons” is a jury question.

### Source and Authority

This instruction is supported by **Borquez**, 940 P.2d at 377–78. See also RESTATEMENT § 652D cmt. a.

**28:7 ABOUT THE PLAINTIFF—DEFINED**

**A public (disclosure) (statement) is about the plaintiff if people who (see) (hear) (read) the (disclosure) (statement) would reasonably understand that it refers to the plaintiff.**

**Source and Authority**

This instruction is supported by 1 ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* § 12:4.3 (5th ed. 2019); 1 J. MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* §§ 3:7 (2d ed. 2018).

## 28:8 PRIVATE FACTS—DEFINED

Private facts are those that relate to the plaintiff's private life and are not already known in the community, contained in a public record, or properly available to the public. Events that take place in public places, information available to the public, or facts that the plaintiff leaves open to the public are not private.

### Notes on Use

1. This instruction is to be used with Instruction 28:5.

2. There are no Colorado cases, and other jurisdictions are divided, as to whether there is a limited exception for giving publicity to extraordinarily embarrassing events that occur in public places. *See* 1 ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* § 12:4.4 (5th ed. 2019).

### Source and Authority

This instruction is supported by **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997); **Tonnessen v. Denver Publishing Co.**, 5 P.3d 959 (Colo. App. 2000); **A.T. v. State Farm Mutual Automobile Insurance Co.**, 989 P.2d 219 (Colo. App. 1999); and **Lincoln v. Denver Post, Inc.**, 31 Colo. App. 283, 501 P.2d 152 (1972). *See also* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977); SACK ON DEFAMATION, *supra*, at § 12:4.4.

**28:9 PUBLIC DISCLOSURE OF PRIVATE FACTS—  
VERY OFFENSIVE TO A REASONABLE  
PERSON—DEFINED**

Public disclosure of private facts is “very offensive” when a reasonable person would feel seriously upset or embarrassed by it. Public disclosure of normal daily activities or of unflattering conduct that would cause minor or even moderate annoyance to a person of ordinary sensitivities cannot be considered “very offensive.”

**Notes on Use**

This instruction is to be used with Instruction 28:5.

**Source and Authority**

1. This instruction is supported by **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997).

2. In **Borquez**, 940 P.2d at 378, the court compared, as illustrative of this standard, **Urbaniak v. Newton**, 226 Cal. App. 3d 1128 (1991) (disclosure of HIV positive status was highly offensive to a reasonable person), with **Virgil v. Sports Illustrated**, 424 F. Supp. 1286 (S.D. Cal. 1976) (disclosure of a person’s unflattering habits and idiosyncrasies was not highly offensive to a reasonable person). *See also* RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977); 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 12:4.6 (5th ed. 2019).

## 28:10 INVASION OF PRIVACY BY PUBLICITY PLACING PLAINTIFF IN A FALSE LIGHT

**No instruction to be given.**

### Note

In **Denver Publishing Co. v. Bueno**, 54 P.3d 893 (Colo. 2002), the Colorado Supreme Court declined to recognize the tort of false light invasion of privacy.

## 28:11 INVASION OF PRIVACY—AFFIRMATIVE DEFENSE—PRIVILEGE

See Instructions 22:18 and 22:19.

### Note

1. The privileges applicable to a defamation action may also be applicable to the privacy torts set forth in Instructions 28:4 and 28:5, involving dissemination of information. RESTATEMENT (SECOND) OF TORTS §§ 652F, 652G (1977). Therefore, the Notes on Use to Instructions 22:17 through 22:20 should be consulted, and Instructions 22:18 and 22:19 on defamation should be used, as appropriately modified.

2. Where the tort at issue is appropriation or public disclosure, Instruction 22:18 should be modified to omit numbered paragraph 1 and if Instruction 22:19 is given, omit element 2.

3. For the cause of action of public disclosure of private facts, the court has embraced the privilege for dissemination of information that is “newsworthy” or of “public or general concern” recognized by the RESTATEMENT § 652D cmt. d, and has required that the plaintiff prove, as part of his or her case, that the defendant’s disclosure is not protected by these doctrines. **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997). In **Joe Dickerson & Assocs., LLC v. Dittmar**, 34 P.3d 995 (Colo. 2001), the court also embraced the privilege protecting publication of matters that are “newsworthy” or “of public or general concern,” but did not determine whether defeating the privilege was an element of the plaintiff’s case or whether the privilege is a matter of affirmative defense that must be pled by the defendant. The court has not determined whether the scope of free speech protection embraced in **Dittmar** for the tort of appropriation is of the same scope as the protective standard that the court made an element of the plaintiff’s case in **Borquez**.

## 28:12 INVASION OF PRIVACY—AFFIRMATIVE DEFENSE—STATUTE OF LIMITATIONS

**See Instruction 22:23.**

### Note

1. With respect to statutes of limitations, Instruction 22:23 and its Notes on Use and Source and Authorities should be used, including the “single publication rule.” If the conduct at issue is something other than “publication,” the instruction should be modified accordingly.

2. There are no Colorado decisions concerning which statute of limitations applies in privacy actions. The general two-year tort statute of limitation, § 13-80-102, C.R.S., probably applies to invasion of privacy torts of intrusion, use of the plaintiff's name or likeness, and public disclosure of private facts. RESTATEMENT (SECOND) OF TORTS § 652E cmt. e (1977); 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS §§ 12:3.4[B], 12:5.2 (5th ed. 2019).

## 28:13 INVASION OF PRIVACY—AFFIRMATIVE DEFENSE—CONSENT

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on the claim of invasion of privacy by (intrusion) (appropriation of plaintiff's name or likeness) (public disclosure of private facts) (placing plaintiff in a false light), if the affirmative defense of consent has been proved. The defense is proved if you find both of the following:

1. The plaintiff, by words or conduct or both, led the defendant reasonably to believe that (he) (she) (it) had (authorized) (or) (agreed to) the defendant's conduct in *(describe conduct in issue, e.g., entering the plaintiff's home, recording of plaintiff's conversation, publicizing of facts concerning plaintiff, use of plaintiff's picture, etc.)*; and

2. The defendant acted in a manner and for a purpose (to which the plaintiff agreed) (to which the defendant reasonably believed the plaintiff agreed) (that the plaintiff authorized) (that the defendant reasonably believed the plaintiff authorized).

### Notes on Use

1. Use whichever parenthesized words and phrases are appropriate in light of the evidence in the case.

2. Omit any numbered paragraph, the facts of which are not in dispute.

3. Some cases use the term "waiver" in lieu of "consent," but apply the same principle as set forth in this instruction. **Borquez v. Robert C. Ozer, P.C.**, 923 P.2d 166, 175 (Colo. App. 1995), *rev'd on other grounds*, 940 P.2d 371 (Colo. 1997).

4. This instruction applies in situations in which there is a dispute over the scope of consent or whether it has been exceeded. See **Doe v. High-Tech Inst., Inc.**, 972 P.2d 1060 (Colo. App. 1998).

5. When plaintiff discloses embarrassing and otherwise private facts in an arbitration proceeding and the disclosure is not subject to a requirement of confidentiality by rule, order, or agreement, the plaintiff

has waived the right of privacy with respect to disclosures by parties to the arbitration. **A.T. v. State Farm Mut. Auto. Ins. Co.**, 989 P.2d 219 (Colo. App. 1999). The plaintiff's consent may bar an intrusion claim even if the consent is procured by false pretenses. **Sundheim v. Bd. of Cty. Comm'rs**, 904 P.2d 1337 (Colo. App. 1995), *aff'd on other grounds*, 926 P.2d 545 (Colo. 1996).

### Source and Authority

This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 652F cmt. b (1977) (incorporating RESTATEMENT § 583 (pertaining to the defense of consent in defamation actions)). *See also* 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS §§ 12:4.8, 12:6 (5th ed. 2019).

**28:14 INVASION OF PRIVACY—DAMAGES**

Plaintiff, (*name*), has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the invasion of plaintiff's privacy by the defendant(s), (*name[s]*), (and the [*insert appropriate description, e.g., "negligence"*], if any, of any designated non-parties).

In determining such damages, you shall consider the following:

1. Any noneconomic losses or injuries which the plaintiff has had to the present time, or which the plaintiff will probably have in the future, including: physical and mental pain and suffering, inconvenience, emotional stress, impairment of the quality of life, injury to the plaintiff's reputation, and (*insert any other recoverable noneconomic losses for which there is sufficient evidence*).

2. Any economic losses which the plaintiff has had to the present time, or which plaintiff will probably have in the future, including: loss of earnings, the ability to earn money in the future, ([reasonable and necessary] medical, hospital, and other expenses), and (*insert any other recoverable economic losses for which there is sufficient evidence*).

**Notes on Use**

1. This instruction and special interrogatories and verdict form conforming to Instructions 6:1A and 6:1B should be used in cases in which the limitations of damages for noneconomic loss or injury set forth in section 13-21-102.5, C.R.S., may be applicable. In cases in which only noneconomic loss or injury is in issue, this instruction may be modified and given without the special interrogatories or special verdict form.

2. The elements of damages typically applicable in an invasion of privacy action are personal humiliation, mental anguish and suffering, and impairment to the plaintiff's reputation incurred by the plaintiff as

a result of the defendant's conduct. *See Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060 (Colo. App. 1998).

3. In cases in which the evidence supports them, the instruction may also refer to physical suffering, loss or injury to credit standing, loss of income, and other elements of compensable damages incurred by the plaintiff.

4. In cases of invasion of privacy by use of the plaintiff's name or likeness, the evidence may also support damages based upon the value of the use of the plaintiff's likeness which has been made by the defendant.

5. The Notes on Use to Instruction 6:1 are also applicable to this instruction.

### Source and Authority

This instruction is supported by *Doe*, 972 P.2d at 1066; and RESTATEMENT (SECOND) OF TORTS § 652H (1977). *See also* Source and Authority for Instruction 6:1.

**28:15 INVASION OF PRIVACY—EXEMPLARY OR  
PUNITIVE DAMAGES**

**See Instruction 5:4.**

**Note**

1. When otherwise applicable to the evidence in the case, Instruction 5:4 should be used for instructing on punitive damages.

2. Except as otherwise provided in section 24-10-118(5), C.R.S., punitive damages are not recoverable against a public entity. *See* § 24-10-114(4), C.R.S.; **Martin v. Cty. of Weld**, 43 Colo. App. 49, 598 P.2d 532 (1979).

## **CHAPTER 29. THE COLORADO CONSUMER PROTECTION ACT**

### **Introductory Note**

#### **29:1 Elements of Liability**

#### **29:2 Deceptive Trade Practices—Defined**

#### **29:3 False Representation/Misrepresentation—Defined**

#### **29:4 Significant Impact on the Public—Defined**

#### **29:5 Actual Damages**

#### **29:6 Treble Damages**

## Introductory Note

1. The General Assembly enacted the Colorado Consumer Protection Act (CCPA), §§ 6-1-101 to -115, C.R.S., in 1969, substantially adopting the major provisions of the 1966 Uniform Deceptive Trade Practices Act (UDTA) but with numerous variations. **People ex rel. Dunbar v. Gym of Am., Inc.**, 177 Colo. 97, 493 P.2d 660 (1972). The CCPA differs from the UDTA in that the legislature granted a private right of action to individual consumers to recover damages for violation of the Act. **Hall v. Walter**, 969 P.2d 224 (Colo. 1998).

2. The CCPA provides for both public and private enforcement. The Attorney General and the county district attorneys have concurrent public enforcement authority. § 6-1-103, C.R.S. Public enforcement remedies include injunctive relief, civil penalties, and criminal actions. §§ 6-1-107 to -112, -114, C.R.S. While causation and actual damages are required in a private cause of action, **Hall**, 969 P.2d at 236, they are not necessary in a public enforcement cause of action. **May Dep't Stores Co. v. State ex rel. Woodard**, 863 P.2d 967 (Colo. 1993). Civil penalties and restitution amounts unverifiable by statute or other fixed standard may not be imposed without an evidentiary hearing followed by Rule 52 findings of fact and conclusions of law. **People v. Wunder**, 2016 COA 46, ¶¶ 29–47, 371 P.3d 785 (a public enforcement action). For a discussion of tribal immunity as a bar to state enforcement of the CCPA, see **Cash Advance & Preferred Cash Loans v. State ex rel. Suthers**, 242 P.3d 1099 (Colo. 2010).

3. Public enforcement actions are intended to proscribe acts; not to compensate injured persons, and are essentially equitable in nature; therefore defendants are not entitled to trial by jury. **People v. Shifrin**, 2014 COA 14, ¶¶ 20–22, 342 P.3d 506. Injunctive relief must be within the authority of the court to proscribe and sufficiently precise to allow the enjoined party to avoid the prohibited conduct. **Wunder**, 2016 COA 46, ¶¶ 21–28 (holding that the vagueness and overbreadth of a broad provision with undefined terms violated C.R.C.P. 65, and remanding that portion of the injunction for reformulation). Chapter 29 does not address the public enforcement mechanisms contained in part 1 of the Act, nor does it address parts 2 through 9 of the CCPA that pertain to specific types of business environments (e.g., auto rental contracts, telemarketing, mobile home sales, and a variety of others). This chapter addresses only the private cause of action and civil damages available when a defendant engages in acts and practices that are prohibited by part 1 of the CCPA.

4. The CCPA regulates commercial activities and practices that “because of their nature, may prove injurious, offensive, or dangerous to the public” and prohibits conduct that has “a tendency or capacity to attract customers through deceptive trade practices.” **Dunbar**, 177 Colo. at 112–13, 493 P.2d at 667–68 (upholding the CCPA against constitutional challenges on due process and equal protection grounds); see **Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.**, 117 P.3d 60 (Colo. App. 2004) (rejecting constitutional challenge to CCPA treble damage provision on substantive and procedural due process grounds). “Our cases have consistently applied the CCPA to advertising and marketing practices that fit within its tenets based on the applicability of the Act to the actions alleged and without regard to the occupational status of the defendant.” **Crowe v. Tull**, 126 P.3d 196, 202 (Colo. 2006).

5. The CCPA is not an exclusive remedy. § 6-1-105(3), C.R.S. For discussions concerning the scope of the CCPA, see **Crowe**, 126 P.3d at 202–05 (discussing different types of harms addressed by CCPA and common-law professional negligence claims, and specifically, legal malpractice claims); **Showpiece Homes Corp. v. Assurance Co. of America**, 38 P.3d 47 (Colo. 2001) (answering certified questions in the insurance context); **Coors v. Security Life of Denver Insurance Co.**, 91 P.3d 393 (Colo. App. 2003) (examining relationship between the Unfair Claims-Deceptive Practices Act and CCPA), *aff’d in part, rev’d in part on other grounds*, 112 P.3d 59 (Colo. 2005).

6. As originally enacted, CCPA remedies were available to “any person” suffering harm from a prohibited practice. **Hall**, 969 P.2d at 231, interpreted “person” broadly to include non-consumers of defendant’s products or services. In apparent response to this decision, the definition of “any person” was amended in 1999 to be an “actual or potential consumer,” a successor-in-interest to an “actual consumer,” or a person injured in “the course of the person’s business or occupation.” § 6-1-113(1)(a), (c), C.R.S. Section 6-1-113(1)(a) provides that actual and potential consumers may bring an action under the Act. Subsection (b) permits a right of action by “any successor in interest to an actual consumer who purchased the defendant’s goods, services, or property.” Based on the plain language of the statute, the court of appeals held that “the only assignees authorized to bring an action are those whose assignors were actual consumers who purchased the defendant’s goods, services, or property.” **U.S. Fax Law Ctr., Inc. v. Myron Corp.**, 159 P.3d 745 (Colo. App. 2006) (action by the assignee of the rights of organizations that

received unsolicited facsimiles but made no purchase dismissed for lack of standing).

7. The CCPA's conferral of the right to bring a civil action may be waived and subject to mandatory arbitration by an agreement between the parties because the statute does not contain a nonwaiver provision preventing enforcement of an arbitration agreement. **Triple Crown at Observatory Vill. Assoc., Inc.**, 2013 COA 150M, ¶¶ 42–45, 328 P.3d 275.

8. The CCPA provides its own three-year limitation of action subject to the discovery rule and a further one-year extension if plaintiff proves that the defendant engaged in conduct calculated to cause plaintiff to forego or delay in asserting a claim. § 6-1-115, C.R.S.

9. The certificate of review requirement of section 13-20-602, C.R.S., applies to CCPA claims against licensed professionals where expert testimony is necessary to establish the standard of conduct against which liability will be measured. **Baumgarten v. Coppage**, 15 P.3d 304 (Colo. App. 2000); **Teiken v. Reynolds**, 904 P.2d 1387 (Colo. App. 1995) (dismissing CCPA claim against physicians based upon allegations of misrepresentations as to the nature, safety, and suitability of breast implants for failure to file a certificate of review).

10. In **Colorado v. Hopp & Associates, LLC**, 2018 COA 71, ¶ 4, 422 P.3d 617, a public enforcement action brought by the Colorado Attorney General subsequent to defendants' discharge of debts in bankruptcy, the trial court awarded attorney fees and costs incurred by the State in pursuing the action. The court of appeals affirmed the award, holding that fines, penalties, or forfeitures for the benefit of a governmental unit are not dischargeable in bankruptcy. *Id.* at ¶ 16.

**29:1 ELEMENTS OF LIABILITY**

For plaintiff, *(name)*, to recover from defendant, *(name)*, on the claim that defendant violated the Colorado Consumer Protection Act, you must find that all of the following have been proved by a preponderance of the evidence:

1. The defendant (engaged in) (or) (caused another to engage in) a deceptive trade practice;
2. The deceptive trade practice occurred in the course of defendant's (business) (vocation) (occupation);
3. The deceptive trade practice significantly impacted the public as actual or potential consumers of the defendant's (goods) (services) (or) (property);
4. The plaintiff (was an actual or potential consumer of the defendant's [goods] [services] or [property]) (or) (was injured in the course of [his] [her] [its] business or occupation as a result of the deceptive trade practice); and
5. The deceptive trade practice caused actual damages or losses to the plaintiff.

If you find that any one of these statements has not been proved, then your verdict on this claim must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, (then your verdict must be for the plaintiff) (then you must consider defendant's affirmative defense of *[insert any affirmative defense that would be a complete defense to plaintiff's claim]*).

If you find that defendant's affirmative defense has been proved by a preponderance of the evidence, then your verdict must be for the defendant.

**However, if you find that the affirmative defense has not been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute.

2. Use whichever parenthesized or bracketed portions are appropriate.

3. When the plaintiff is the successor-in-interest to the actual consumer, the consumer's name should be used in place of the word "plaintiff" in paragraph 4 of the instruction.

4. If there are affirmative defenses, additional instructions should be given. *See, e.g.,* § 6-1-106, C.R.S. (exceptions to CCPA applicability).

5. In **Hall v. Walter**, 969 P.2d 224 (Colo. 1998), the Colorado Supreme Court held that to establish a private cause of action under the CCPA, the plaintiff must prove five distinct elements: (1) that defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) that the practice significantly impacted the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury. *Accord* **Brodeur v. Am. Home Assur. Co.**, 169 P.3d 139 (Colo. 2007); **Crowe v. Tull**, 126 P.3d 196 (Colo. 2006).

6. The instruction omits the fourth element stated in **Hall**, 969 P.2d at 235, that plaintiff suffered injury-in-fact to a legally protected interest. This element presents a question of law as to standing and will thus not be submitted for jury determination. *But see* **Anson v. Trujillo**, 56 P.3d 114 (Colo. App. 2002). Injuries to property are a legally protected interest actionable under the CCPA. **Hall**, 969 P.2d at 237.

7. While the causation and injury requirements may be inferred from circumstantial evidence common to a class sought to be certified under C.R.C.P. 23, the trial court must rigorously analyze individuals presented to determine if class-wide inferences are appropriate. **Garcia v. Medved Chevrolet, Inc.**, 263 P.3d 92 (Colo. 2011) (affirming court of appeals remand of class certification order to analyze the effect of individualized rebuttal evidence of new car sales transactions).

### Source and Authority

1. This instruction is supported by section 6-1-113(1), C.R.S.; **Bro-**

deur, 169 P.3d at 155; **Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.**, 62 P.3d 142 (Colo. 2003); **Hall**, 969 P.2d at 235; and **Park Rise Homeowners Ass'n v. Resource Construction Co.**, 155 P.3d 427 (Colo. App. 2006).

2. Section 6-1-115, C.R.S., provides a three-year limitation of action period for actions brought under the CCPA, which period may be extended by one year if plaintiff can prove conduct by the defendant that induced the failure to commence suit on a timely basis. Given this statutory extension provision, equitable tolling may not be applied to extend the CCPA's statute of limitations further. **Damian v. Mtn. Parks Elec., Inc.**, 2012 COA 217, ¶ 17, 310 P.3d 242.

3. The CCPA is not an exclusive remedy. § 6-1-105(3), C.R.S. A private cause of action under the CCPA is cumulative of other statutory and common-law remedies, and a "plaintiff may bring both 'CCPA and other causes of action based on the same facts.'" **Hall**, 969 P.2d at 237 (quoting **Lexton-Ancira Real Estate Fund, 1972 v. Heller**, 826 P.2d 819, 823 (Colo. 1992)). *See also* **Crowe**, 126 P.3d at 205 (claims against attorneys for professional negligence, on the one hand, and CCPA violations on the other are distinct and serve different purposes); **Showpiece Homes Corp. v. Assurance Co. of Am.**, 38 P.3d 47 (Colo. 2001) (insured may maintain action against its insurer for bad faith handling of the insured's claim as well as a claim under the CCPA).

4. Despite the fact that certain violations of the Act appear to incorporate terms of negligence, *see, e.g.*, § 6-1-105(1)(g) (liability created when advertiser represents that services are of certain quality when he "knows or should know" they are of another quality), "[a] CCPA claim will only lie if the plaintiff can show the defendant knowingly engaged in a deceptive trade practice." **Crowe**, 126 P.3d at 204 (it is "an absolute defense" that representation was caused by negligence or honest mistake).

5. Corporate officers may be sued individually for their participation in deceptive practices covered by the Act. **Hoang v. Arbess**, 80 P.3d 863 (Colo. App. 2003); **People ex rel. MacFarlane v. Albert Corp.**, 660 P.2d 1295 (Colo. App. 1982).

6. Under some circumstances, the CCPA may apply to post-sale conduct. **Showpiece Homes**, 38 P.3d at 58 (bad-faith handling of insurance claim); **Dodds v. Frontier Chevrolet Sales & Serv., Inc.**, 676 P.2d 1237 (Colo. App. 1983) (fraudulently obtained post-sale release).

7. A trial court's dismissal of a class action CCPA claim involving parking fines and late fees was affirmed because (1) the use of a metered parking space is not a consumer transaction; (2) the challenged conduct complied with city ordinances and was, thus, exempt from CCPA regulation; and (3) plaintiffs were not consumers of the services at issue.

**Rector v. City & Cty. of Denver**, 122 P.3d 1010 (Colo. App. 2005); *see* **Shotkoski v. Denver Inv. Group, Inc.**, 134 P.3d 513 (Colo. App. 2006) (real estate purchaser's agent's failure to have broker's license at time she negotiated purchase was not violation of section 6-1-105(1)(z), because CCPA subsection applied to performance of services and sale of property, not to real estate purchases).

8. Section 6-1-702(1)(c), C.R.S., provides that violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, and the rules promulgated under it constitutes a deceptive trade practice. Determining that a claim for liquidated damages under the TCPA is one for a penalty and, therefore, unassignable, the supreme court reinstated a trial court's dismissal of claims brought by an assignee for lack of standing. **Kruse v. McKenna**, 178 P.3d 1198 (Colo. 2008); *see also* **Consumer Crusade, Inc. v. Clarion Mortg. Capital, Inc.**, 197 P.3d 285 (Colo. App. 2008). In **McKenna v. Oliver**, 159 P.3d 697 (Colo. App. 2006), the court held that assignees of claims under the TCPA lacked standing to pursue an action under the Act because it is an action in the nature of invasion of privacy, which is not assignable under Colorado law. *Accord* **U.S. Fax Law Ctr., Inc. v. T2 Techs., Inc.**, 183 P.3d 642 (Colo. App. 2007).

## 29:2 DECEPTIVE TRADE PRACTICES—DEFINED

**A defendant engages in a deceptive trade practice if, in the course of (his) (her) (its) (business) (trade) (occupation), the defendant:**

*(Insert, using separately numbered paragraphs for each, a suitable description of any relevant deceptive trade practice(s) of which there is sufficient evidence. Additional instructions may need to be given to fully define the deceptive trade practice(s) alleged.)*

### Notes on Use

The CCPA lists a large number of deceptive trade practices. See § 6-1-105(1), C.R.S.

### Source and Authority

1. This instruction is supported by section 6-1-105(1), (2) and (3); **Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.**, 62 P.3d 142 (Colo. 2003); and **Hall v. Walter**, 969 P.2d 224 (Colo. 1998).

2. Although some of the deceptive practices listed suggest that there can be a negligent violation of the statute, *see, e.g.*, § 6-1-105(1)(f) and (g), the Colorado Supreme Court has held that liability under the CCPA may be implicated only by intentional conduct, and that there can be no liability where a misrepresentation was “caused by negligence or an honest mistake.” **Crowe v. Tull**, 126 P.3d 196, 204 (Colo. 2006); *see also* **Brodeur v. Am. Home Assur. Co.**, 169 P.3d 139, 156 (Colo. 2007) (“The crux of a CCPA claim is a deceptive trade practice, which, by definition, must be intentionally inflicted on the consumer public.” (quoting **Crowe**, 126 P.3d at 204)); **Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP**, 230 P.3d 1275 (Colo. App. 2010) (“bait-and-switch” claim requires intent to deceive); **State ex rel. Suthers v. Mandatory Poster Agency, Inc.**, 260 P.3d 9 (Colo. App. 2009) (defendant who acted with mere negligence and not actual knowledge of falsity did not “knowingly” make a false representation under section 6-1-105(1)(b), (c), and (e)).

3. As a matter of law, the failure of a service provider to inform a consumer that it was acting in conformity with the law does not state a claim for an unfair or deceptive trade practice under the CCPA. **Wainscott v. Centura Health Corp.**, 2014 COA 105, ¶ 67, 351 P.3d 513 (hospital’s failure to inform a patient that it was pursuing a statutory hospital lien to collect actual charges rather than bill Medicare for a reduced amount, as it was legally allowed to do, was not an unfair or deceptive trade practice).

4. For discussions concerning the scope of the CCPA, see **Crowe**, 126 P.3d 196; **Showpiece Homes Corp. v. Assurance Co. of America**, 38 P.3d 47 (Colo. 2001) (answering certified questions in the insurance context); and **Coors v. Security Life of Denver Insurance Co.**, 91 P.3d 393 (Colo. App. 2003) (examining relationship between the Unfair Claims-Deceptive Practices Act and CCPA), *aff'd in part, rev'd in part on other grounds*, 112 P.3d 59 (Colo. 2005).

5. In **Mendoza v. Pioneer General Insurance Co.**, 2014 COA 29, ¶ 31, 365 P.3d 371, a jury's finding that automobile dealer engaged in a deceptive practice was constituted a final determination of fraud as a matter of law for purposes of triggering a bond issued pursuant to the Motor Vehicle Dealer Bond Statute.

## 29:3 FALSE REPRESENTATION/ MISREPRESENTATION—DEFINED

A “misrepresentation” or “false representation” is a false statement that (induces the person to whom it is made to act or to refrain from acting) (has the capacity or tendency to attract consumers) (has the capacity to deceive the recipient even if it did not).

### Notes on Use

This instruction should be given when the CCPA claim uses the words “misrepresentation” or “false representation.” § 6-1-105(1), C.R.S.

### Source and Authority

1. This instruction is supported by **Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.**, 62 P.3d 142 (Colo. 2003).

2. A promise made in a contract cannot constitute a misrepresentation unless the promisor did not intend to honor the promise at the time it was made. **Rhino Linings USA**, 62 P.3d at 148. In such cases, it may be appropriate to give a modified version of Instruction 19:12.

3. Only knowing misrepresentations are actionable under the CCPA, as there must be an intent to defraud. **Crowe v. Tull**, 126 P.3d 196 (Colo. 2006); see **Brodeur v. Am. Home Assur. Co.**, 169 P.3d 139 (Colo. 2007); **State ex rel. Suthers v. Mandatory Poster Agency, Inc.**, 260 P.3d 9 (Colo. App. 2009) (defendant who did not have actual knowledge of falsity of his statements acted with mere negligence and did not “knowingly” make a false representation within the meaning of CCPA).

4. As a matter of law, “mere puffery” is not actionable under the CCPA. **Park Rise Homeowners Ass’n v. Res. Constr. Co.**, 155 P.3d 427 (Colo. App. 2006) (touting “quality construction” of condominiums was “mere puffery,” not actionable under the CCPA).

## 29:4 SIGNIFICANT IMPACT ON THE PUBLIC— DEFINED

In determining whether the challenged trade practice(s) significantly impacted the public as actual or potential consumers of the defendant's (goods), (services), or (property), you shall consider all of the following:

1. The number of consumers directly affected by the challenged trade practice(s); (and)
2. The relative sophistication of the consumers directly affected by the challenged trade practice(s); (and)
3. The bargaining power of the consumers directly affected by the challenged trade practice(s); (and)
4. Evidence that the challenged trade practice(s) (has) (have) previously impacted other consumers; (and)
5. Evidence that the challenged trade practice(s) (has) (have) a significant potential to impact other consumers in the future(.) (; and)
- (6. *Include any other factors the court has determined are relevant in determining significant public impact.*)

### Notes on Use

1. Unless the facts are undisputed, the determination as to whether there is a significant public impact is a factual one and not a question of law. **One Creative Place, LLC v. Jet Ctr. Partners, LLC**, 259 P.3d 1287 (Colo. App. 2011).

2. Conclusory allegations of public impact without reference to facts that allege harm or potential harm to identifiable member of the public are insufficient to support a CCPA claim. **Rees v. Unleaded Software, Inc.**, 2013 COA 164, ¶ 42, 383 P.3d 20, *aff'd in part, rev'd in part on other grounds*, 2016 CO 51, 373 P.3d 603.

3. The factors set forth in this instruction are relevant consider-

ations on the public impact issue and should be used as applicable but appear not conclusive or exhaustive of the issue in every case. **Rhino Linings USA, Inc. v. Rocky Mtn. Rhino Lining, Inc.**, 62 P.3d 142 (Colo. 2003); **Martinez v. Lewis**, 969 P.2d 213 (Colo. 1998).

4. It is uncertain whether “relative sophistication” referred to in the second factor refers to sophistication regarding the business out of which the challenged practices arise or to general business sophistication. See **Rhino Linings USA**, 62 P.3d at 150 (one plaintiff was represented by counsel and the other plaintiff was “relatively sophisticated in his education and knowledge of the business of selling the product”); **Martinez**, 969 P.2d at 222 (State Farm “has extensive experience as a consumer of this type of service.”); **Coors v. Sec. Life of Denver Ins. Co.**, 91 P.3d 393 (Colo. App. 2003) (noting that plaintiff was “a sophisticated businessman” in a general sense), *aff’d in part, rev’d in part on other grounds*, 112 P.3d 59 (Colo. 2005); **Rees**, 2013 COA 164, ¶¶ 43–44 (a private contract dispute between sophisticated business entities does not state a CCPA claim).

### Source and Authority

1. This instruction is supported by **Rhino Linings USA**, 62 P.3d at 150; **Hall v. Walter**, 969 P.2d 224 (Colo. 1998); and **Martinez v. Lewis**, 969 P.2d 213 (Colo. 1998).

2. The CCPA is not intended to provide additional remedies to claimants whose disputes have no public impact but are purely private transactions. **Rhino Linings USA**, 62 P.3d at 150. Factors to be considered in determining whether there was significant public impact include: (1) the number of consumers directly affected by the challenged practice; (2) the relative sophistication and bargaining power of the consumers; and (3) evidence that the challenged practice has previously impacted other consumers or has significant potential to do so in the future. *Id.*; accord **Brodeur v. Am. Home Assur. Co.**, 169 P.3d 139 (Colo. 2007); **Crowe v. Tull**, 126 P.3d 196 (Colo. 2006); **Bankr. Estate of Morris v. COPIC Ins Co.**, 192 P.3d 519 (Colo. App. 2008); see also **Martinez**, 969 P.2d at 222; **Coors**, 91 P.3d at 399. Further, although the public nature of a business may be a factor to consider in determining whether a challenged practice significantly affects the public, that fact alone is insufficient to satisfy this element. **Brodeur**, 169 P.3d at 155–56 (public nature of state’s workers’ compensation program is not enough to constitute per se public impact under Act); see **Bankr. Estate of Morris**, 192 P.3d at 528 (rejecting notion that tort of insurance bad faith, by its very nature, involves public impact).

3. The “public impact” element was held satisfied in **Shekarchian v. Maxx Auto Recovery, Inc.**, 2019 COA 60, ¶ 56 (towing company’s practice of requiring vehicle owners to sign a form release containing a false statement before inspecting the impounded vehicle at the request of a third-party lender); and **Vista Resorts, Inc. v. Goodyear Tire &**

**Rubber Co.**, 117 P.3d 60 (Colo. App. 2004) (affirming CCPA judgment based on evidence that 950 other consumers lodged complaints of product defect similar to those made by plaintiff).

4. The “public impact” element was found not shown in **Brodeur**, 169 P.3d at 156 (public nature of workers’ compensation insurance program is not sufficient to constitute per se public impact under CCPA); **State ex rel. Weiser v. Castle Law Group, LLC**, 2019 COA 49, ¶ 116, 457 P.3d 699 (law firm’s failure to disclose to two of its clients that its principals had ownership interest in one of its vendors did not significantly impact actual or potential consumers of its services); **Hildebrand v. New Vista Homes II, LLC**, 252 P.3d 1159 (Colo. App. 2010) (reversing CCPA judgment for owners who bought a home in a 38-residence development where proof of direct impact of the builder-vendor’s misrepresentations was confined to plaintiffs, and the record contained no evidence of impact on other home buyers, the bargaining power and sophistication of other purchasers, or widespread dissemination of sales brochure); **General Steel Domestic Sales, LLC v. Hogan & Hartson, LLP**, 230 P.3d 1275 (Colo. App. 2010) (where no false information was conveyed that attorney would act as lead counsel in all cases for his firm, there was no public impact); **Colorado Coffee Bean, LLC v. Peaberry Coffee Inc.**, 251 P.3d 9 (Colo. App. 2009) (no direct public impact because Internet posting seeking possible franchise purchasers was widely available, where only 68 packets of information were actually sent out to persons responding to posting, nothing in posting was untrue, and posting was not an offer to contract); **Bankruptcy Estate of Morris**, 192 P.3d at 528 (rejecting assertion that claim for insurance bad faith, by its very nature, involves public impact); and **Coors**, 91 P.3d at 399 (evidence that defendant’s deception involved 223 other consumers did not satisfy public impact element because number affected was only 1% of all consumers of product, which was insufficient proof of public impact, and record contained no evidence of actual harm to other consumers).

## 29:5 ACTUAL DAMAGES

### No instruction provided.

#### Note

1. Neither the statute nor Colorado case law defines what “actual damages” means in the CCPA; however, where actual damages have been proven, the plaintiff is entitled to at least \$500.00. § 6-1-113(2)(a)(I) & (II), C.R.S.

2. Although a plaintiff may bring both a CCPA claim and other causes of action based on the same conduct, double recovery of the same actual damages or of both punitive and treble damages is not permitted. **Coors v. Sec. Life of Denver Ins. Co.**, 112 P.3d 59 (Colo. 2005); **Lexton-Ancira Real Estate Fund, 1972 v. Heller**, 826 P.2d 819 (Colo. 1992).

3. A statutory offer to settle “all claims” in a case that included a CCPA claim was held to encompass “all relief sought on the basis of a claim in the original complaint,” including statutory attorney fees awardable under section 6-1-113(2)(b). **Bumbal v. Smith**, 165 P.3d 844, 846 (Colo. App. 2007).

4. Except in class actions or an action brought to enforce liability under section 6-1-709, C.R.S. (sales of manufactured homes), a successful claimant under the Act is entitled to an award of “costs of the action together with reasonable attorney fees as determined by the court.” § 6-1-113(2)(b), C.R.S.; see **Holcomb v. Steven D. Smith, Inc.**, 170 P.3d 815, 817 (Colo. App. 2007).

5. When the award of attorney fees depends upon “a successful result in the litigation in which they are to be awarded and the fees are for services rendered in connection with that litigation, a determination of the propriety of an award of fees need not be made until that litigation is completed and the result is known.” **Roa v. Miller**, 784 P.2d 826, 829 (Colo. App. 1989).

6. Because entitlement to attorney fees under the Act requires successful proof of defendant’s liability for commission of deceptive acts, attorney fees recoverable under the CCPA are “costs” under section 13-16-122(1)(h), C.R.S. (attorney fees authorized by statute may be awarded as costs).

7. Fees awarded as costs need not be specifically pleaded, are determined by the court post-trial, and are not subject to doubling or trebling; their determination does not delay the time for appeal of the underlying judgment. **Ferrell v. Glenwood Brokers, Ltd.**, 848 P.2d 936 (Colo. 1993).

8. For a discussion of the method to be used and factors to be considered in determining the amount of the mandatory award of at-

torney fees and costs under section 6-1-113(2)(b), see **Payan v. Nash Finch Co.**, 2012 COA 135M, 310 P.3d 212.

9. This chapter does not address public enforcement mechanisms. *But see* **People v. Wunder**, 2016 COA 46, ¶¶ 21–28, 371 P.3d 785 (reversing criminal enforcement judgment awarding civil penalties and restitution in amounts unverifiable by statute or other fixed standard and remanding with directions to hold an evidentiary hearing with C.R.C.P. 52 findings of fact and conclusions of law supporting monetary awards).

## 29:6 TREBLE DAMAGES

If you find in favor of plaintiff and award (him) (her) (it) actual damages on (his) (her) (its) claim of violation of the Colorado Consumer Protection Act, then you must consider whether the plaintiff has proved by clear and convincing evidence that the defendant engaged in bad faith conduct.

“Bad faith conduct” means fraudulent, willful, knowing, or intentional conduct that causes (injuries) (damages) (or) (losses).

A fact has been proved by “clear and convincing evidence” if, considering all evidence, you find it to be highly probable and you have no serious or substantial doubt.

### Notes on Use

1. When there is sufficient evidence to submit the question of bad faith conduct to the jury, the question should be submitted as a special interrogatory on the jury verdict form.

2. Instruction 3.2, defining clear and convincing evidence, should be given with this instruction.

3. If liability under the CCPA and “bad faith conduct” under this instruction are established, an award of treble damages is mandatory. **Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.**, 117 P.3d 60 (Colo. App. 2004).

4. The court of appeals has held that a trial court’s refusal to advise the jury that any award of actual damages may be trebled was not error but declined to hold that a jury may never be advised of treble damages. **Heritage Vill. Owners Ass’n v. Golden Heritage Inv’rs, Ltd.**, 89 P.3d 513 (Colo. App. 2004).

### Source and Authority

1. This instruction is supported by section 6-1-113(2)(a)(III), (2.3), C.R.S.

2. If both treble and punitive damages are awarded based on the same conduct, the claimant must elect between the awards and may not recover both types of these statutory damages. **Lexton-Ancira Real**

**Estate Fund, 1972 v. Heller**, 826 P.2d 819 (Colo. 1992); *see also* **Martinez v. Affordable Housing Network, Inc.**, 109 P.3d 983 (Colo. App. 2004) (trial court properly remitted punitive damages award because it awarded treble damages under section 6-1-113), *rev'd on other grounds*, 123 P.3d 1201 (Colo. 2005).

3. Where the record supports verdicts for both punitive and treble damages, reversal of a judgment under the CCPA may require remand to consider reinstatement of the punitive damage award. **Coors v. Sec. Life of Denver Ins. Co.**, 112 P.3d 59 (Colo. 2005).

4. No Colorado appellate decision has yet expressly addressed the issue of whether, in a case where entitlement to treble damages has been proved, prejudgment interest should be added to the actual damage award before or after trebling.

# CHAPTER 30. CONTRACTS

## Introductory Note

### A. CONTRACT FORMATION

- 30:1 Contract Formation—In Dispute
- 30:2 Contract Formation—Need Not Be in Writing
- 30:3 Contract Formation—Offer
- 30:4 Contract Formation—Revocation of Offer
- 30:5 Contract Formation—Counteroffer
- 30:6 Contract Formation—Acceptance
- 30:7 Contract Formation—Consideration
- 30:8 Contract Formation—Modification
- 30:9 CONTRACT FORMATION—THIRD-PARTY BENEFICIARY

### B. CONTRACT PERFORMANCE

- 30:10 Contract Performance—Breach of Contract—Elements of Liability
- 30:11 Contract Performance—Breach of Contract Defined
- 30:12 Contract Performance—Substantial Performance
- 30:13 Contract Performance—Anticipatory Breach
- 30:14 Contract Performance—Time of Performance
- 30:15 Contract Performance—Conditions Precedent
- 30:16 Contract Performance—Implied Duty of Good Faith and Fair Dealing—Non-Insurance Contract
- 30:17 Contract Performance—Assignment

### C. DEFENSES

#### Introductory Note

- 30:18 Defense—Fraud in the Inducement
- 30:19 Defense—Undue Influence
- 30:20 Defense—Duress
- 30:21 Defense—Minority
- 30:22 Defense—Mental Incapacity
- 30:23 Defense—Impossibility of Performance
- 30:24 Defense—Inducing a Breach by Words or Conduct
- 30:25 Defense—Waiver
- 30:26 Defense—Statute of Limitations
- 30:27 Defense—Cancellation by Agreement
- 30:28 Defense—Accord and Satisfaction (Later Contract)
- 30:29 Defense—Novation

## D. CONTRACT INTERPRETATION

### Introductory Note

- 30:30 Contract Interpretation—Disputed Term
- 30:31 Contract Interpretation—Parties' Intent
- 30:32 Contract Interpretation—Contract as a Whole
- 30:33 Contract Interpretation—Ordinary Meaning
- 30:34 Contract Interpretation—Use of Technical Words in a Contract
- 30:35 Contract Interpretation—Construction Against Drafter
- 30:36 Contract Interpretation—Specific and General Clauses

## E. DAMAGES

### Introductory Note

- 30:37 Damages—Introduction
- 30:38 Damages—General
- 30:39 Damages—Special
- 30:40 Damages—Liquidated
- 30:41 Damages—Nominal
- 30:42 Damages—Purchaser's for Breach of Land Purchase Contract
- 30:43 Damages—Seller's for Breach of Land Purchase Contract
- 30:44 Damages—Employer's for Employee's Breach of Personal Service Contract
- 30:45 Damages—Builder's for Breach of Construction Contract by Owner Prior to Completion
- 30:46 Damages—Builder's for Substantial Though Not Complete Performance of Construction Contract
- 30:47 Definition—Contract Price Agreed Upon
- 30:48 Damages—Builder's for Owner's Partial Breach—Failure to Make Installment Payment
- 30:49 Damages—Owner's for Breach of Construction Contract by Builder
- 30:50 Damages—Owner's for Delay in Completion of Construction Contract
- 30:51 Damages—Broker's for Breach of Real Estate Commission Contract
- 30:52 Damages—Owner's for Wrongful Deprivation of Use of a Chattel
- 30:53 Damages—Owner's for Breach of a Covenant Against Encumbrances

## F. PARTICULAR CONTRACTS

- 30:54 Claim—Building Contractor's Breach of Implied Warranty—Elements of Liability
- 30:55 Definition—Building Contractor's Implied Warranties

30:56 Claim—Real Estate Commission—Elements of Liability

### **Introductory Note**

1. The instructions in this chapter have been drafted for use in contract cases generally. They have not been drafted to incorporate provisions of the Uniform Commercial Code, C.R.S., title 4, such as cases in which the plaintiff is seeking contract-like damages (as opposed to tort-like damages) for injuries or damage to persons or property allegedly caused by a breach of warranty.

2. In cases involving contracts for the sale of goods, however, several instructions in this chapter may be applicable, subject to their being appropriately modified to conform with the U.C.C. *See* § 4-1-103, C.R.S. See also instructions in Part B of Chapter 14 which may be adapted for use in cases involving claims for contract damages (as opposed to tort damages) for breach of warranty of a contract for sale of goods.

## A. CONTRACT FORMATION

### 30:1 CONTRACT FORMATION—IN DISPUTE

A contract is an agreement between two or more persons or entities. A contract consists of an offer and an acceptance of that offer, and must be supported by consideration. If any one of these three elements is missing, there is no contract.

#### Notes on Use

1. See Notes on Use to Instruction 30:10.

2. The question of whether or not an alleged contract is sufficiently definite in its terms to be judicially enforceable is normally a question to be determined by the court. See **Stice v. Peterson**, 144 Colo. 219, 355 P.2d 948 (1960). For the test to be applied in cases involving contracts for the sale of goods, see section 4-2-204(3), C.R.S.

3. For the requisite manifestation of assent in contracts for the sale of goods, see section 4-1-201(3), C.R.S.

4. For the requirement of consideration, see Source and Authority to Instruction 30:7.

#### Source and Authority

1. This instruction is supported by **Denver Truck Exchange v. Perryman**, 134 Colo. 586, 307 P.2d 805 (1957) (For an enforceable contract to exist there must be mutual assent to an exchange between competent parties, legal consideration, and sufficient certainty with respect to the subject matter and essential terms of the agreement.). See also **Indus. Prods. Int'l, Inc. v. Emo Trans, Inc.**, 962 P.2d 983 (Colo. App. 1997).

2. "The general rule is that when parties to a contract ascribe different meanings to a material term of a contract, the parties have not manifested mutual assent, no meeting of the minds has occurred, and there is no valid contract. However, an exception to the general rule is observed when the meaning that either party gives to the document's language was the only reasonable meaning under the circumstances. In such cases, both parties are bound to the reasonable meaning of the contract's terms." **Sunshine v. M. R. Mansfield Realty, Inc.**, 195 Colo. 95, 98, 575 P.2d 847, 849 (1978) (citation omitted). Moreover, when the parties to a bargain, sufficiently defined to be a contract, have not agreed to an essential term, the court may supply a term that is reasonable under the circumstances. **Costello v. Cook**, 852 P.2d 1330

(Colo. App. 1993). Also, a contract will not fail for indefiniteness if missing terms can be supplied by law, presumption, or custom. **Winston Fin. Group, Inc. v. Fults Mgmt. Inc.**, 872 P.2d 1356 (Colo. App. 1994). And, a contract is not fatally vague or indefinite simply because the parties disagree as to its meaning. **Hauser v. Rose Health Care Sys.**, 857 P.2d 524 (Colo. App. 1993); see **In re May**, 756 P.2d 362, 369 (Colo. 1988) (“The fact that the parties have different opinions about the interpretation of the contract does not of itself create an ambiguity.”). However, where a mistake is made by one party on the basic nature of a material contract provision, a resulting unconscionable contract may be avoided. **Sumerel v. Goodyear Tire & Rubber Co.**, 232 P.3d 128 (Colo. App. 2009) (where one party knew arithmetical calculation of damages was erroneous, risk of mistake did not rest with other party, and the agreement made based on that calculation was unconscionable, agreement was unenforceable (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 153–54 (1981))).

3. Generally, there can be no binding contract if further negotiations are required to come to an agreement as to important and essential terms of the contract. **Sumerel**, 232 P.3d at 136–37 (discussion to resolve dispute did not include offer sufficiently definite to be capable of acceptance); **DiFrancesco v. Particle Interconnect Corp.**, 39 P.3d 1243, 1248 (Colo. App. 2001) (“Agreements to agree in the future are generally unenforceable because the court cannot force parties to come to an agreement.”).

4. Where extrinsic evidence shows that parties did not intend the contract to be a binding agreement, and where they have previously agreed that their written promises would not bind them, such contract is a mere sham and lacks any legal effect. **Landmark Towers Ass’n, Inc. v. UMB Bank, N.A.**, 2016 COA 61, ¶ 63, 436 P.3d 1126 (organizers options to purchase property to make them eligible voters were void and unenforceable sham agreements), *rev’d on other grounds*, 2017 CO 107, 408 P.3d 836.

## 30:2 CONTRACT FORMATION—NEED NOT BE IN WRITING

A contract does not have to be in writing. If written, it does not have to be signed by either party or dated. A contract may be partly oral and partly in writing.

### Notes on Use

1. This instruction may be used where the agreement does not fall within special rules requiring a written contract, including the statute of frauds.

2. If the contract requires signatures or dating, this Instruction should not be given or should be appropriately modified.

### Source and Authority

This instruction is supported by **E-21 Engineering v. Steve Stock & Associates, Inc.**, 252 P.3d 36 (Colo. App. 2010) (contracts may be formed without signatures of the parties bound by them). *See also Lee v. Great Empire Broad., Inc.*, 794 P.2d 1032 (Colo. App. 1989) (employment agreement); RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981) (“A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.”).

### 30:3 CONTRACT FORMATION—OFFER

**An offer is a proposal to enter into a contract on the terms stated in the offer.**

#### Notes on Use

1. When given, this instruction must be given in conjunction with Instruction 30:6 (acceptance).
2. For possible modifications required in cases involving the sale of goods, see sections 4-2-204 to 2-206, C.R.S. *See, e.g., Scoular Co. v. Denney*, 151 P.3d 615 (Colo. App. 2006) (interpreting section 4-2-205, C.R.S.).

#### Source and Authority

1. This instruction is supported by **Nash v. School Board No. 3**, 49 Colo. 555, 113 P. 1003 (1911) (by implication); and **Robert E. Lee Silver Mining Co. v. Omaha & Grant Smelting & Refining Co.**, 16 Colo. 118, 26 P. 326 (1891) (same). *See also Industrial Prods. Int'l, Inc. v. Emo Trans, Inc.*, 962 P.2d 983 (Colo. App. 1997) (offer is manifestation by one party of willingness to enter into bargain).
2. In the absence of an express or implied limitation, an offer must be accepted within a reasonable time, and a reasonable time “is that which is reasonable to the offeror rather than to the offeree.” **Central Inv. Corp. v. Container Advert. Co.**, 28 Colo. App. 184, 187, 471 P.2d 647, 648 (1970).
3. To be effective an offer must be communicated. **Kuta v. Joint Dist. No. 50(J)**, 799 P.2d 379 (Colo. 1990).
4. Generally, the delivery of an insurance application by an insurer to a prospective customer does not constitute an offer of insurance; instead it is an invitation for an offer of insurance. **Griffin v. State Farm Fire & Cas. Co.**, 104 P.3d 283 (Colo. App. 2004).
5. There is no offer capable of acceptance where the circumstances show the parties intended to negotiate further on some provisions. **Sumerel v. Goodyear Tire & Rubber Co.**, 232 P.3d 128 (Colo. App. 2009).

## 30:4 CONTRACT FORMATION—REVOCATION OF OFFER

(Plaintiff) (Defendant) claims the offer was revoked before it was accepted.

To revoke an offer is to withdraw it. Unless otherwise specified by the terms of the offer, an offer may be revoked before it is accepted. To be effective, a revocation must be communicated before the offer is accepted.

### Notes on Use

None.

### Source and Authority

1. This instruction is supported by **Stortroen v. Beneficial Finance Co.**, 736 P.2d 391 (Colo. 1987); **Carlsen v. Hay**, 69 Colo. 485, 195 P. 103 (1921); **East-Larimer County Water District v. Centric Corp.**, 693 P.2d 1019 (Colo. App. 1984); **Sigrist v. Century 21 Corp.**, 519 P.2d 362 (Colo. App. 1973) (not published pursuant to C.A.R. 35(f)); **Smith v. Russell**, 20 Colo. App. 554, 80 P. 474 (1905); and 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 5:9 (4th ed. 1999).

2. Unless otherwise specified by its terms, an offer may be accepted within a reasonable time unless the offer has been revoked by the offeror or rejected by the offeree. **Minneapolis & St. Louis Ry. v. Columbus Rolling-Mill Co.**, 119 U.S. 149 (1886); *see also* **Townsend v. Daniel, Mann, Johnson & Mendenhall**, 196 F.3d 1140, 1145 (10th Cir. 1999) ("Once the offer was rejected, it must be renewed again in its entirety before it can be accepted."); **Scoular Co. v. Denney**, 151 P.3d 615 (Colo. App. 2006); **Sigrist**, 519 P.2d at 363 ("Offers to enter into either bilateral or unilateral contracts may not be revoked after acceptance."); **Central Inv. Corp. v. Container Adver. Co.**, 28 Colo. App. 184, 187, 471 P.2d 647, 648 (1970) ("The test for an offer's duration in the absence of an express or implied limitation is a 'reasonable time.'").

**30:5 CONTRACT FORMATION—COUNTEROFFER**

If the person to whom an offer is made changes the offer in any way, that is a counteroffer. Unless that counteroffer is accepted, no contract is made.

**Notes on Use**

1. Changes or additions to an offer may be a counteroffer that may be accepted to form a contract. This instruction may be appropriately modified for cases involving issues of acceptance of counteroffers.

2. Cases involving offers and counteroffers in real estate transactions and with real estate agents may require more detailed factual findings and this instruction may need to be appropriately modified. See **Stortroen v. Beneficial Fin. Co.**, 736 P.2d 391 (Colo. 1987).

**Source and Authority**

1. This instruction is supported by **Baldwin v. Peters, Writer & Christensen**, 141 Colo. 529, 349 P.2d 146 (1960); **Van Hall v. Gehrke**, 117 Colo. 223, 185 P.2d 1016 (1947); and **Yorty v. Mortgage Finance, Inc.**, 29 Colo. App. 398, 485 P.2d 915 (1971).

2. Contract principles of offer, acceptance, and counteroffer do not control offers of settlement and counteroffers under section 13-17-202, C.R.S. **Centric-Jones Co. v. Hufnagel**, 848 P.2d 942 (Colo. 1993).

## 30:6 CONTRACT FORMATION—ACCEPTANCE

A contract is formed when the offer is accepted without (changes) (additions). An acceptance is an expression, by words or conduct, by the person to whom the offer was made, of agreement to the same terms stated in the offer.

### Notes on Use

1. Omit any parenthesized clause that is not applicable to the evidence in the case.

2. When Instruction 30:3 (offer) is given, this instruction must also be given.

3. For modifications required in cases involving the sale of goods, see sections 4-2-206 and 4-2-207, C.R.S. *See, e.g., Scoular Co. v. Denney*, 151 P.3d 615 (Colo. App. 2006) (interpreting statute).

### Source and Authority

This instruction is supported by **Nucla Sanitation District v. Rippy**, 140 Colo. 444, 449, 344 P.2d 976, 979 (1959) (“the acceptance must be in the identical terms of the offer, without any modification whatever”). *See also Baldwin v. Peters, Writer & Christensen*, 141 Colo. 529, 349 P.2d 146 (1960); **Superior Distrib. Corp. v. Points**, 141 Colo. 113, 347 P.2d 140 (1959); **Van Hall v. Gehrke**, 117 Colo. 223, 185 P.2d 1016 (1947); **Salomon v. Webster**, 4 Colo. 353 (1878); **Yorty v. Mortgage Fin., Inc.**, 29 Colo. App. 398, 485 P.2d 915 (1971).

## 30:7 CONTRACT FORMATION—CONSIDERATION

“Consideration” is a benefit received or something given up as agreed upon between the parties. (If you find *[insert the claimed consideration]*, then you must find that there was consideration.)

### Notes on Use

This instruction should be used when Instruction 30:1 (in dispute) is given.

### Source and Authority

1. This instruction is supported by **Troutman v. Webster**, 82 Colo. 93, 96, 257 P. 262, 263–64 (1927) (“[I]t is a consideration if the promisee, in return for a promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, even though there is no actual loss or detriment to him or actual benefit to the promisor.”). The court also quoted 1 WILLISTON, CONTRACTS § 102a (1924), to the effect that “[d]etriment . . . means legal detriment as distinguished from detriment in fact.” **Troutman**, 82 Colo. at 96, 257 P. at 264; *see also* **Ireland v. Jacobs**, 114 Colo. 168, 163 P.2d 203 (1945) (An agreement not supported by consideration is invalid and void.); **Cooper v. Cooper**, 112 Colo. 140, 146 P.2d 986 (1944) (recognizing the legal detriment rule).

2. This instruction was cited with approval in **Compass Bank v. Kone**, 134 P.3d 500 (Colo. App. 2006).

3. While the Colorado courts’ definition of consideration has varied somewhat, in the majority of cases the “benefit-detriment” test has been used to determine if consideration existed. *See, e.g.*, **Gertner v. Limon Nat’l Bank**, 82 Colo. 13, 257 P. 247 (1927); **Luby v. Jefferson County Bank**, 28 Colo. App. 441, 476 P.2d 292 (1970); **Fearnley v. De Mainville**, 5 Colo. App. 441, 39 P. 73 (1895).

4. Another general definition of consideration appears in **Grimes v. Barndollar**, 58 Colo. 421, 148 P. 256 (1914), in which the court stated that any damage, suspension of a right, or possibility of loss to the one to whom the promise is made is a sufficient consideration to support the promise.

5. Generally, a court will not look at the adequacy of the consideration, **Meyer v. Nelson**, 69 Colo. 56, 168 P. 1175 (1917), and, as a general rule, a statement of consideration is conclusive proof of that fact unless evidence to the contrary is introduced. **Burch v. Burch**, 145 Colo. 125, 358 P.2d 1011 (1960).

6. In several cases, courts have identified specific facts that may constitute sufficient consideration. For example, a seal in itself no lon-

ger imparts a valuable consideration. **Winter v. Goebner**, 2 Colo. App. 259, 30 P. 51 (1892), *aff'd*, 21 Colo. 279, 40 P. 570 (1895). Surrender of payment of a doubtful or a disputed claim is good consideration. **Harvey v. Denver & Rio Grande R.R.**, 44 Colo. 258, 99 P. 31 (1908); **Russell v. Daniels**, 5 Colo. App. 224, 37 P. 726 (1894). A promise for a promise is valid consideration, **Denver Indus. Corp. v. Kesselring**, 90 Colo. 295, 8 P.2d 767 (1932), as is the forbearance of a right, **Leonard v. Hallett**, 57 Colo. 274, 141 P. 481 (1914). A preexisting liability is good consideration for a new promise, as is a benefit to a third party. **W. T. Rawleigh Co. v. Dickneite**, 99 Colo. 276, 61 P.2d 1028 (1936). Where an employment contract is terminable at the will of the employee, the employer's promise to pay additional compensation is supported by consideration. **Olsen v. Bondurant & Co.**, 759 P.2d 861 (Colo. App. 1988) (promise to another promisee, supported by consideration, to pay employees additional compensation as third-party beneficiaries, also provides consideration for that promise). Continued employment, without more, is not consideration for a later noncompete agreement. The continuation of an at-will employment arrangement by the employer is sufficient consideration for a noncompetition agreement presented to the employee after his or her initial hire. **Lucht's Concrete Pumping, Inc. v. Horner**, 255 P.3d 1058 (Colo. 2011). And consideration is not insufficient merely because it comes from a third party. **Int'l Paper Co. v. Cohen**, 126 P.3d 222 (Colo. App. 2005).

7. At least one case has held that natural affection being the reason to agree to pay a loved one is sufficient consideration. **Dawley v. Dawley's Estate**, 60 Colo. 73, 152 P. 1171 (1915). *But see* **Rasmussen v. State Nat'l Bank**, 11 Colo. 301, 18 P. 28 (1888) (moral obligation alone is not sufficient consideration).

8. In general, past consideration is not always sufficient. *Compare* **Plains Iron Works Co. v. Haggott**, 68 Colo. 121, 188 P. 735 (1920) (agreement was *nudum pactum* because the consideration was past), *with* **Sargent v. Crandall**, 143 Colo. 199, 352 P.2d 676 (1960) (past consideration may be sufficient consideration if the prior conduct that constitutes the past consideration was rendered at the promisor's request).

9. If one party to an executory contract has no legally enforceable obligations or an unlimited right to determine the nature and extent of those obligations, the contract lacks mutuality of consideration and may, therefore, be unenforceable. *See* **Hauser v. Rose Health Care Sys.**, 857 P.2d 524 (Colo. App. 1993) (recognizing the rule, but concluding that where contract had been performed by one party and the claim was for compensation due for performance, lack of mutuality was immaterial). However, every contractual obligation need not be mutual as long as each party to the contract has provided consideration. **Rains v. Found. Health Sys. Life & Health**, 23 P.3d 1249 (Colo. App. 2001) (arbitration provision not unenforceable simply because it did not require both parties to contract to arbitrate).

10. For certain offers, involving the sale of goods, that may be irrevocable though not supported by consideration, see section 4-2-205, C.R.S.

11. When the basis for claiming the enforceability of a promise is the doctrine of promissory estoppel, see **Cherokee Metropolitan District v. Simpson**, 148 P.3d 142 (Colo. 2006); **Nelson v. Elway**, 908 P.2d 102 (Colo. 1995); **Kiely v. St. Germain**, 670 P.2d 764 (Colo. 1983) (enforceability under the doctrine of a promise not made in compliance with the statute of frauds); **Vigoda v. Denver Urban Renewal Authority**, 646 P.2d 900 (Colo. 1982); **G & A Land, LLC v. City of Brighton**, 233 P.3d 701 (Colo. App. 2010) (city's actions related to possible future condemnation of landowner's property did not constitute a promise for purposes of promissory estoppel); **Marquardt v. Perry**, 200 P.3d 1126 (Colo. App. 2008) (defense verdict on contract claim does not preclude judgment for liability on related promissory estoppel claim); **Lutfi v. Brighton Community Hospital Ass'n**, 40 P.3d 51 (Colo. App. 2001); **Floyd v. Coors Brewing Co.**, 952 P.2d 797 (Colo. App. 1997), *rev'd on other grounds*, 978 P.2d 663 (Colo. 1999); **Zick v. Krob**, 872 P.2d 1290 (Colo. App. 1993); **Chidester v. Eastern Gas & Fuel Associates**, 859 P.2d 222 (Colo. App. 1992); **Mead Associates, Inc. v. Scottsbluff Sash & Door Co.**, 856 P.2d 40 (Colo. App. 1993); **L & M Enterprises, Inc. v. City of Golden**, 852 P.2d 1337 (Colo. App. 1993); **Frontier Exploration, Inc. v. American National Fire Insurance Co.**, 849 P.2d 887 (Colo. App. 1992); **Nicol v. Nelson**, 776 P.2d 1144 (Colo. App. 1989) (claim based on promissory estoppel need only be proved by a preponderance of the evidence, in accord with section 13-25-127(1), C.R.S., not by clear and convincing evidence); and **State Department of Highways v. Woolley**, 696 P.2d 828 (Colo. App. 1984) (applying the doctrine to estop landowner from revoking a right of entry). *See also* **Univex Int'l, Inc. v. Orix Credit All., Inc.**, 914 P.2d 1355 (Colo. 1996) (section 38-10-124(3), C.R.S., precludes assertion of promissory estoppel claim to enforce unsigned credit agreement); **Vu, Inc. v. Pacific Ocean Marketplace, Inc.**, 36 P.3d 165 (Colo. App. 2001) (promissory estoppel claim failed where contract was clear, unambiguous and enforceable as written); **Pickell v. Arizona Components Co.**, 902 P.2d 392 (Colo. App. 1994) (promissory estoppel is not available if there is an enforceable contract between the parties), *rev'd on other grounds*, 931 P.2d 1184 (Colo. 1997); **Cronk v. Intermountain Rural Elec. Ass'n**, 765 P.2d 619 (Colo. App. 1988); **Galie v. RAM Assocs. Mgmt. Servs., Inc.**, 757 P.2d 176 (Colo. App. 1988); **Mead Assocs., Inc. v. Antonsen**, 677 P.2d 434 (Colo. App. 1984); **Haselden-Langley Constructors, Inc. v. D.E. Farr & Assocs., Inc.**, 676 P.2d 709 (Colo. App. 1983).

12. Promissory estoppel may be asserted against a public entity. **Dep't of Transp. v. First Place, LLC**, 148 P.3d 261 (Colo. App. 2006). A claim based on promissory estoppel lies in contract rather than tort and, therefore, is not barred by the Governmental Immunity Act. **Bd. of Cty. Comm'rs v. DeLozier**, 917 P.2d 714 (Colo. 1996). However, the doctrine of estoppel is not applied as freely against a municipal corporation as it is against an individual. **Cherry Creek Aviation, Inc. v. City of Steamboat Springs**, 958 P.2d 515 (Colo. App. 1998).

## 30:8 CONTRACT FORMATION—MODIFICATION

After parties enter into a contract, they may agree (orally) (or) (in writing) to change it. There must be an offer to change the contract, acceptance of that offer, and consideration for the change.

### Notes on Use

1. Use whichever parenthesized words are appropriate to the evidence in the case.

2. Other instructions closely related to the subject matter of this instruction that may also be applicable or be more appropriate in certain cases are Instructions 30:25 (waiver), 30:27 (rescission or cancellation by agreement), and 30:28 (accord and satisfaction).

3. This instruction should be modified when appropriate to the evidence in the case to instruct that a written contract may be modified by later oral agreement even if the contract expressly provides that all modifications must be in writing.

4. For cases involving the sale of goods, see section 4-2-209, C.R.S.

### Source and Authority

1. This instruction is supported by **Dawe v. Hoskins**, 77 Colo. 501, 238 P. 50 (1925) (necessity of all parties to assent); and **Arkansas Valley Bank v. Esser**, 75 Colo. 110, 224 P. 227 (1924) (parties to a written contract may orally alter it at will). *See also* **H. & W. Paving Co. v. Asphalt Paving Co.**, 147 Colo. 506, 364 P.2d 185 (1961) (amendment must be supported by mutual consideration); **W. Air Lines v. Hollenbeck**, 124 Colo. 130, 235 P.2d 792 (1951) (mutual assent required for an effective amendment or abrogation of an existing contract); 2 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 7.14 (rev. ed. 1995).

2. "Despite a provision requiring that all modifications of a written contract . . . be in writing, [a] contract may be modified by oral agreement between the parties." **Colorado Inv. Servs., Inc. v. Hager**, 685 P.2d 1371, 1376-77 (Colo. App. 1984); *see* **Agritrack, Inc. v. DeJohn Housemoving, Inc.**, 25 P.3d 1187 (Colo. 2001) (written contract may be modified by later oral agreement even if contract specifically provides that all modifications of contract must be in writing); **James H. Moore & Assocs. Realty, Inc. v. Arrowhead at Vail**, 892 P.2d 367 (Colo. App. 1994) (same). Further, a written contract may be modified by a later oral agreement even if the contract is subject to the statute of frauds, as long as the oral modification does not relate to a material condition of the contract. **Burnford v. Blanning**, 189 Colo. 292, 540 P.2d 337 (1975); **James H. Moore**, 892 P.2d at 372.

3. The court is not a party to an agreement, and the parties may not enlist the court as their agent to write or modify terms. **23 LTD v. Herman**, 2019 COA 113, ¶ 33, 457 P.3d 754, 759 (“[P]arties to an employment or noncompete agreement cannot contractually obligate a court to blue pencil noncompete provisions that it determines are unreasonable.”).

### 30:9 CONTRACT FORMATION—THIRD-PARTY BENEFICIARY

(Plaintiff) (Defendant) may enforce a contract if (he) (she) (it) is a beneficiary of the contract between (name) and (name), even if (plaintiff) (defendant) was not named in the contract. (Plaintiff) (Defendant) is a beneficiary of the contract when the parties to the contract intend that the (plaintiff) (defendant) directly benefit from the contract.

#### Notes on Use

None.

#### Source and Authority

1. This instruction is supported by **Jefferson County School Dist. No. R-1 v. Shorey**, 826 P.2d 830 (Colo. 1992); **Chandler-McPhail v. Duffey**, 194 P.3d 434 (Colo. App. 2008); **Everett v. Dickinson & Co.**, 929 P.2d 10 (Colo. App. 1996).

2. A person not a party to an express contract may bring an action on the contract if the parties to the agreement intended to benefit the nonparty, provided that the benefit claimed is a direct and not merely an incidental benefit of the contract. While the intent to benefit the nonparty need not be expressly recited in the contract, the intent must be apparent from the terms of the agreement, the surrounding circumstances, or both. **Parrish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co.**, 874 P.2d 1049 (Colo. 1994) (holding that clinic was incidental, not third party, beneficiary of the contract). It is not necessary that the third party be specifically referred to in the agreement. It is sufficient if the claimant is a member of the limited class that was intended to benefit from the contract. **Smith v. TCI Commc'ns, Inc.**, 981 P.2d 690 (Colo. App. 1999).

3. The party who actually performed the subcontract was a third-party beneficiary of the contract between the general contractor and the subcontractor and was entitled to bring an action for damages for lost profits sustained as a result of contractor's breach of such contract. **E.B. Roberts Constr. Co. v. Concrete Contractors, Inc.**, 704 P.2d 859 (Colo. 1985).

4. As to when a third-party beneficiary may be entitled to recover for breach of contract, see **Cody Park Property Owners' Ass'n v. Harder**, 251 P.3d 1 (Colo. App. 2009) (subdivision homeowners association was not third-party beneficiary of agreement for easement); **Chandler-McPhail v. Duffey**, 194 P.3d 434 (Colo. App. 2008)

(defendant doctor was a third-party beneficiary of contracts between health care plan insurer, patient's employer, and physician group, and was bound by contract provision barring recovery of costs in litigation); **East Meadows Co. v. Greeley Irrigation Co.**, 66 P.3d 214 (Colo. App. 2003); **Harwig v. Downey**, 56 P.3d 1220 (Colo. App. 2002) (tenants not third-party beneficiaries of contract for sale of real property); **Smith**, 981 P.2d at 693–94 (provider of cable television channel was not third-party beneficiary of franchise agreement between city and cable television operator); **Frisone v. Deane Automotive Center., Inc.**, 942 P.2d 1215 (Colo. App. 1996) (buyer of used car was not third-party beneficiary of repair contract between previous owner of car and automotive service center); **Everett**, 929 P.2d at 12 (introducing broker was not third-party beneficiary of clearing broker agreements); **State Farm Fire & Casualty Co. v. Nikitow**, 924 P.2d 1084 (Colo. App. 1995); **Bain v. Pioneer Plaza Shopping Center. Ltd. Liability Co.**, 894 P.2d 47 (Colo. App. 1995); **Villa Sierra Condominium Ass'n v. Field Corp.**, 878 P.2d 161 (Colo. App. 1994); and **Quigley v. Jobe**, 851 P.2d 236 (Colo. App. 1992) (plaintiff only an incidental beneficiary). If a contract is annulled, rescinded, or canceled by the parties to the contract before it is accepted by a third-party beneficiary, the contract may not be enforced by the third-party beneficiary. **Jardel Enters., Inc. v. Triconsultants, Inc.**, 770 P.2d 1301 (Colo. App. 1988); **Galie v. RAM Assocs. Mgmt. Servs., Inc.**, 757 P.2d 176 (Colo. App. 1988) (third-party beneficiary need not be in privity).

5. The strict privity rule bars third-party beneficiary actions against attorneys absent allegations of fraud, malicious conduct, or negligent misrepresentation. **Bewley v. Semler**, 2018 CO 79, ¶ 27, 432 P.3d 582, 589 (“The strict privity rule, as we defined it in **Baker**, is not as restricted as Semler contends; it ‘precludes attorney liability to non-clients absent fraud, malicious conduct, or negligent misrepresentation.’” (quoting **Baker v. Wood, Ris & Hames, P.C.**, 2016 CO 5, ¶ 1, 364 P.3d 872, 874)).

**B. CONTRACT PERFORMANCE****30:10 CONTRACT PERFORMANCE—BREACH OF  
CONTRACT—ELEMENTS OF LIABILITY**

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on *(his)* *(her)* *(its)* claim of breach of contract, you must find *(all)* *(both)* of the following have been proved by a preponderance of the evidence:

1. The defendant entered into a contract with the plaintiff to *(insert the alleged promise on which plaintiff is suing)*; and

2. The defendant failed to *(insert the alleged promise on which the plaintiff is suing)*; (and)

(3. The plaintiff [*“substantially performed”*] [*“substantially complied with”*] [*his*] [*her*] [*its*] part of the contract) (or) (Plaintiff is excused from performance. Plaintiff is excused from performance of [*his*] [*her*] [*its*] part of the contract if you find that *[insert facts that, if proven, would as a matter of law justify nonperformance]*).

If you find that (either) (any one or more) of these *(number)* statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant’s affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to plaintiff’s claim]*).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense

**has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. When the existence of the contract is in issue, Instruction 30:1 and contract formation Instructions 30:2–30:9 should be considered. If the existence of the contract is not disputed, the jury may be advised that the parties do not dispute that a contract was formed, but dispute that there was a breach or the amount of damages caused by any breach, or both. *See* Chapter 2 (statement of the case to be determined).

2. This instruction should be modified as appropriate to reflect the positions of plaintiff, counter-plaintiff, defendant and counter-defendant in the case.

3. Paragraph 3 of this instruction should be used only if the plaintiff's performance or substantial performance of the contract is a condition precedent to plaintiff's right to recover under the contract.

4. This instruction may be appropriately modified in cases involving particular kinds of contracts, e.g., a suit on a promissory note, to set forth in terms more relevant to the case the facts that are in dispute and that the plaintiff must prove in order to recover. For cases involving performance of construction contracts, see Instruction 30:49 and the Notes on Use and Source and Authority to that Instruction. See Part F of this chapter for other contracts. For instructions dealing with breach of employment contract claims, see Chapter 31.

5. Depending on the facts in dispute, e.g., third party beneficiary, other paragraphs should be included which will properly present the factual issues in dispute to the jury.

6. If the defendant has put no affirmative defense in issue or there is insufficient evidence to support a defense, the last two paragraphs should be omitted.

7. Although mitigation of damages is an affirmative defense (see Instruction 5:2), only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the damages instruction appropriate to the claim and the evidence in the case.

8. For other affirmative defenses, see Instructions in Part C of this chapter.

9. In cases involving issues of the duty of good faith and fair deal-

ing implied in every contract, see Instruction 30:16 (non-insurance contract) and Chapter 25, Bad Faith Breach of Insurance Contract.

### Source and Authority

1. This instruction is supported by **Hunt v. Cates**, 61 Colo. 365, 157 P. 1162 (1916); **McDonald v. Zions First Nat'l Bank, N.A.**, 2015 COA 29, ¶ 48, 348 P.3d 957; and **Long v. Cordain**, 2014 COA 177, ¶ 19, 343 P.3d 1061 (stating elements needed to prove a contract claim). *See also* **Coors v. Sec. Life of Denver Ins. Co.**, 91 P.3d 393 (Colo. App. 2003) (to prevail on claim for breach of contract, party must show existence of contract and failure to perform some term of contract by other party), *aff'd in part, rev'd in part on other grounds*, 112 P.3d 59 (Colo. 2005); *cf.* **Smith v. Mills**, 123 Colo. 11, 225 P.2d 483 (1950) (a complaint is sufficient if it alleges the existence of a contract and the nonperformance of the promise made).

2. Principles of conditions precedent are set forth in 8 CATHERINE A. McCauliff, CORBIN ON CONTRACTS § 30.7 (Joseph M. Perillo ed., rev. ed. 1999), considering the occurrence or nonoccurrence of any condition precedent (under certain circumstances). Conditions precedent must be specifically pleaded. C.R.C.P. 9(c). For authority considering conditions precedent, see **Western Distributing Co. v. Diodosio**, 841 P.2d 1053 (Colo. 1992) (defendant had received substantially all the benefit expected from the contract and therefore plaintiffs had substantially performed their obligations and could assert breach of contract claim against defendant, even though not every obligation was performed); and **D.R. Horton, Inc.-Denver v. Bischof & Coffman Construction, LLC**, 217 P.3d 1262 (Colo. App. 2009) (trial court erred in instructing jury that general contractor could not recover damages for breach of contract from subcontractors if they found subcontractors had substantially performed). *See also* **Daybreak Constr. Specialties, Inc. v. Saghatoleslami**, 712 P.2d 1028, 1031 (Colo. App. 1985) ("When the obligations of a contract for sale and purchase of land are mutual and concurrent [i.e., the performance of each is a condition precedent to the obligation to perform the other], so long as one party makes no tender of deed and the other no offer of payment, neither is in default."). Whether a breach of contract is material and therefore excuses the other party from performance is generally a question of fact. **Blood v. Qwest Servs. Corp.**, 224 P.3d 301 (Colo. App. 2009) (whether third-party plaintiff had materially breached or not substantially performed its contract with third-party defendant a question for jury), *aff'd on other grounds*, 252 P.3d 1071 (2011); **Morris v. Belfor USA Group, Inc.**, 201 P.3d 1253 (Colo. App. 2008); **Kaiser v. Market Square Discount Liquors, Inc.**, 992 P.2d 636 (Colo. App. 1999) (material breach by a party deprives that party of the right to demand performance by the other party).

3. "[W]hen the existence of a contract is in issue, and the evidence is conflicting or admits of more than one inference, it is for the jury to decide whether a contract in fact exists." **I.M.A., Inc. v. Rocky**

**Mountain Airways, Inc.**, 713 P.2d 882, 887 (Colo. 1986); *see also* **Broomfield Senior Living Owner LLC v. R.G. Brinkman Co.**, 2017 COA 31, ¶ 35, 413 P.3d 219 (whether builder was given reasonable opportunity to correct defects, and whether defects were patent or latent were disputed issues of fact for the jury); **Command Commc'ns, Inc. v. Fritz Cos.**, 36 P.3d 182 (Colo. App. 2001) (existence of contract a question of fact for jury to determine); **Fair v. Red Lion Inn**, 920 P.2d 820 (Colo. App. 1995), *aff'd on other grounds*, 943 P.2d 431 (Colo. 1997); **Tuttle v. ANR Freight Sys., Inc.**, 797 P.2d 825 (Colo. App. 1990); **Stroh v. Am. Recreation & Mobile Home Corp.**, 35 Colo. App. 196, 201, 530 P.2d 989, 993 (1975) (“the question of the existence of a warranty and whether that warranty was breached is ordinarily one for the trier of fact”).

4. Because a plaintiff is entitled to recover at least nominal damages if the plaintiff proves the existence of a contract and its breach and there is no defense, proof of general damages has not been included as one of the elements of the plaintiff's proof of liability. **Interbank Invs., LLC v. Eagle River Water & Sanitation Dist.**, 77 P.3d 814, 818 (Colo. App. 2003) (“Proof of actual damages is not an essential element of a breach of contract claim.”); *see* Instruction 30:38 (General Damages—Measure). *But see* **Diodosio**, 841 P.2d at 1058; **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003) (damages is element of breach of contract claim); **Montemayor v. Jacor Commc'ns, Inc.**, 64 P.3d 916 (Colo. App. 2002) (damages an element of plaintiff's claim for breach of contract).

5. Claims for breach of contract may be made against state and municipal governmental entities. The Colorado Governmental Immunity Act (CGIA) applies to tort action but does not apply to contract actions. § 24-10-106(1), C.R.S. (“A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant . . . .”); **CAMAS Colorado, Inc. v. Bd. of Cty. Comm'rs**, 36 P.3d 135 (Colo. App. 2001) (public entities are not immune under CGIA for damages arising in contract). The issue under the CGIA is not whether a contract claim was properly pleaded but, instead, whether the claim could have been brought as a tort. **City of Arvada v. Denver Health & Hosp. Auth.**, 2017 CO 97, ¶ 42, 403 P.3d 609, 617 (equitable claim for recovery of medical expenses “resembles one sounding in contract and cannot lie in tort”); **Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1**, 2018 COA 92, ¶ 17 (“enforcement of contractual promises through the quasi-contractual theory of promissory estoppel and the restitution theory of unjust enrichment . . . sound firmly in contract” and are not barred by the CGIA); **Foster v. Bd. of Governors**, 2014 COA 18, ¶ 15, 342 P.3d 497 (it is only when a claim cannot lie in tort that there is no immunity); **Casey v. Colo. Higher Ed. Ins. Benefits All. Trust**, 2012 COA 134, ¶ 30, 310 P.3d 196 (same).

6. This elemental instruction and notes were cited with approval in **Dorsey & Whitney LLP v. RegScan, Inc.**, 2018 COA 21, ¶ 47 (find-

ing no error in trial court's refusal to instruct jury in the legal fee dispute that it must find that "the contract was fair and reasonable under the circumstances").

A finding of contract is not sufficient to preclude a finding of unconscionable contract.

If material breach occurs after a party fails to timely perform, the contract is not automatically voided.

A contract is not material if the party has not substantially performed. A contract is not material if the party has not substantially performed. A contract is not material if the party has not substantially performed.

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## 30:11 CONTRACT PERFORMANCE—BREACH OF CONTRACT DEFINED

**A breach of contract is the failure to perform a contractual promise when performance is due.**

**(A material breach occurs when a party fails to (substantially perform) (or) (substantially comply with) the essential terms of a contract.)**

**(A breach is not material if the other party received substantially what (he) (she) (it) contracted for. In determining whether a breach is material, you may consider the nature of the promised performance, the purpose of the contract, and whether any defects in performance have defeated the purpose of the contract.)**

**(A material breach by one party excuses performance by the other party to the contract.)**

### Notes on Use

1. This instruction, which defines the phrase “breach of contract,” should be given whenever Instruction 30:10 is given. Use the parenthetical paragraphs when issues of material breach are present in the case.

2. Other instructions may be needed to further refine the “breach of contract” term, and should be given as needed according to the facts of the case, e.g., Instruction 30:12 (substantial performance), Instruction 30:13 (anticipatory breach), Instruction 30:15 (conditions precedent).

### Source and Authority

1. This instruction is supported by **Hunt v. Cates**, 61 Colo. 365, 157 P. 1162 (1916); and **Western Distributing Co. v. Diodosio**, 841 P.2d 1053 (Colo. 1992). *Cf.* **Smith v. Mills**, 123 Colo. 11, 225 P.2d 483 (1950) (a complaint is sufficient if it alleges the existence of a contract and the nonperformance of the promise made).

2. For discussion of material breach, see **Stan Clauson Associates Inc. v. Coleman Brothers Construction, LLC**, 2013 COA 7, ¶ 9, 297 P.3d 1042 (“A party has substantially performed when the other party has substantially received the expected benefit from the contract” and “[d]eviation from contract duties in trifling particulars . . . does not constitute a material breach”); and **Coors v. Security Life of Denver**

**Ins. Co., 91 P.3d 393 (Colo. App. 2003) (to prevail on claim for breach of contract, party must show existence of contract and failure to perform some term of contract by other party), *aff'd in part, rev'd in part on other grounds*, 112 P.3d 59 (Colo. 2005).**

## 30:12 CONTRACT PERFORMANCE—SUBSTANTIAL PERFORMANCE

A party (substantially performs) (or) (substantially complies with) the terms of a contract when the party performs the essential obligations under the contract, and the other party receives substantially what (he) (she) (it) contracted for.

To determine whether the party has (substantially performed) (or) (substantially complied with) the essential obligations under the contract, you may consider the nature of the promised performance, the purpose of the contract, and whether any defects in performance have defeated the purpose of the contract.

### Notes on Use

If the defendant, pursuant to C.R.C.P. 9(c), has pleaded the lack of complete performance as the nonperformance of a condition precedent, then the plaintiff must prove either complete or substantial performance. See Note 2 of the Notes on Use to Instruction 30:10. See also Note 2 of the Notes on Use to Instruction 30:46 (substantial performance by builder).

### Source and Authority

1. This instruction is supported by **Reynolds v. Armstead**, 166 Colo. 372, 443 P.2d 990 (1968); and **Newcomb v. Schaeffler**, 131 Colo. 56, 279 P.2d 409 (1955). See also **W. Distrib. Co. v. Diodosio**, 841 P.2d 1053 (Colo. 1992); **Rohauer v. Little**, 736 P.2d 403 (Colo. 1987); **I.M.A., Inc. v. Rocky Mtn. Airways, Inc.**, 713 P.2d 882 (Colo. 1986); **McDonald v. Zions First Nat'l Bank, N.A.**, 2015 COA 29, ¶ 50, 348 P.3d 957 (“A party has substantially performed when the other party has substantially received the expected benefit of the contract.” (quoting **Stan Clauson Assocs. Inc. v. Coleman Bros. Constr., LLC**, 2013 COA 7, ¶ 9, 297 P.3d 1042)); **R.F. Carle Co. v. Biological Sciences Curriculum Study Co.**, 616 P.2d 989 (Colo. App. 1980). Where there has been a “material” breach of contract, substantial performance has not been rendered. **Interbank Invs. LLC v. Vail Valley Consol. Water Dist.**, 12 P.3d 1224 (Colo. App. 2000) (breach that is material goes to essence of contract and renders substantial performance of contract impossible). To determine whether a breach is material, “the trier of fact should consider: (1) the extent to which an injured party, absent the breach, would obtain a substantial benefit from the contract, and (2) the adequacy of compensation in damages.” **Nat'l Propane**

**Corp. v. Miller**, 18 P.3d 782 (Colo. App. 2000); *accord* **Coors v. Sec. Life of Denver Ins. Co.**, 91 P.3d 393 (Colo. App. 2003), *aff'd in part, rev'd in part on other grounds*, 112 P.3d 59 (Colo. 2005).

2. Generally, performance or substantial performance by the plaintiff is a condition precedent to the right to recover on the contract. *See, e.g.*, **Diodosio**, 841 P.2d at 1058; **Newcomb**, 131 Colo. at 62–63, 270 P.2d at 412 (builder's failure to substantially perform excused owners' obligation to pay remaining balance on the contract); **Whiting-Turner Contracting Co. v. Guar. Co. of N. Am.**, 2019 COA 44, ¶¶ 27–28, 440 P.3d 1282 (only substantial performance with bond notice requirements is necessary to recover on a surety bond); **D.R. Horton, Inc.-Denver v. Bischof & Coffman Constr., LLC**, 217 P.3d 1262 (Colo. App. 2009) (substantial performance was not a bar to recovery of contract damages); *see also* **Blood v. Qwest Servs. Corp.**, 224 P.3d 301 (Colo. App. 2009) (whether third-party plaintiff had materially breached or not substantially performed its contract with third-party defendant a question for jury), *aff'd on other grounds*, 252 P.3d 1071 (Colo. 2011).

3. Whether a breach of contract is material and therefore excuses the other party from performance is generally a question of fact. **Morris v. Belfor USA Group, Inc.**, 201 P.3d 1253 (Colo. App. 2008); **Kaiser v. Market Square Disc. Liquors, Inc.**, 992 P.2d 636 (Colo. App. 1999) (material breach by a party deprives that party of the right to demand performance by the other party). On the other hand, the fact that one may have rendered substantial performance does not mean that that party has not breached the contract and is not, therefore, liable for any damages. *See* **Zambakian v. Leson**, 77 Colo. 183, 234 P. 1065 (1925); 8 CATHERINE A. McCauliff, CORBIN ON CONTRACTS § 36.3 (Joseph M. Perillo ed., rev. ed. 1999). Rather, it means that the other party is not entitled to regard the breach as giving him or her a right to repudiate the contract and refuse to perform his or her own return promise. *See generally* **Converse v. Zinke**, 635 P.2d 882 (Colo. 1981); **Little Thompson Water Ass'n v. Strawn**, 171 Colo. 295, 466 P.2d 915 (1970); CORBIN ON CONTRACTS, *supra*, at §§ 36.1–36.11.

4. Even if a party has failed to render substantial performance and breached a contract, the party may nonetheless be entitled to recover in *quantum meruit* for the value of the benefits conferred to the extent those benefits exceed the loss caused by the party's breach. **Denver Ventures, Inc. v. Arlington Lane Corp.**, 754 P.2d 785 (Colo. App. 1988).

5. The principle and rules set out in this instruction are not limited to construction contracts. *See* **R.F. Carle Co.**, 616 P.2d at 991–92.

### 30:13 CONTRACT PERFORMANCE— ANTICIPATORY BREACH

A party to a contract who shows a clear and definite intention not to perform the contract before the time when (his) (her) (its) own performance (is due) (is to be completed) commits a breach of contract. The intention not to perform may be shown by words or conduct or both.

#### Notes on Use

1. Use whichever parenthesized words are most appropriate.
2. For possible modifications required in cases involving the sale of goods, see sections 4-2-610 and 4-2-611, C.R.S.

#### Source and Authority

1. This instruction is supported by **Lake Durango Water Co. v. Public Utilities Commission**, 67 P.3d 12 (Colo. 2003); **Brown v. Jefferson County School District No. R-1**, 2012 COA 98, ¶ 55, 297 P.3d 976; and **Highlands Ranch University Park, LLC v. Uno of Highlands Ranch, Inc.**, 129 P.3d 1020 (Colo. App. 2005). See also RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981) (cited in Brown, ¶ 55, 297 P.3d at 987). Among the cases that have recognized the doctrine of anticipatory breach, expressly or by implication, are **Dreier v. Sherwood**, 77 Colo. 539, 238 P. 38 (1925) (unequivocal words of repudiation); **Long v. Wright**, 70 Colo. 173, 197 P. 1016 (1921) (doctrine expressly recognized); **Mulford v. Torrey Exploration Co.**, 45 Colo. 81, 100 P. 596 (1909) (doctrine recognized where defendant voluntarily rendered himself incapable of performing prior to the time when his performance was due); **Saxonia Mining & Reduction Co. v. Cook**, 7 Colo. 569, 4 P. 1111 (1884) (repudiation by unequivocal words); **Durango Transportation, Inc. v. City of Durango**, 786 P.2d 428 (Colo. App. 1989) (manifestation of intent not to perform must be definite and unequivocal), *rev'd on other grounds*, 807 P.2d 1152 (Colo. 1991); and **Johnson v. Benson**, 725 P.2d 21 (Colo. App. 1986) (repudiation by unequivocal language).

2. The following do not alone constitute a repudiation: a negative attitude; doubtful or indefinite statements that a party may or may not perform; statements that, under certain circumstances that do not yet exist, the party will not perform; or statements showing a desire to cancel or change the terms of a contract. 10 JOHN E. MURRAY, JR., CORBIN ON CONTRACTS § 54.16 (Joseph M. Perillo ed., rev. ed. 2014).

3. Repudiation of a contract does not excuse the repudiating party from performing its part of the contract, but does allow the nonrepudiat-

ing party to terminate the contract. **Interbank Invs. LLC v. Vail Valley Consol. Water Dist.**, 12 P.3d 1224 (Colo. App. 2000).

### 30:14 CONTRACT PERFORMANCE—TIME OF PERFORMANCE

If a contract does not state a specific time when the parties are to perform their obligations under the contract, then the parties are to perform within a reasonable time. In deciding whether a contractual obligation has been performed within a reasonable time, you may consider all the circumstances, including the nature of the contract, the parties' diligence, and any reason why the obligation was not performed at an earlier time.

#### Notes on Use

This instruction may be used whenever a written contract is silent about the date or time of performance or where the evidence indicates that the parties to an oral contract did not have specific intentions about a date for performance.

#### Source and Authority

1. This instruction is supported by **Boggs v. McMickle**, 120 Colo. 53, 206 P.2d 824 (1949). *See also* **Geiger v. Kiser**, 47 Colo. 297, 107 P. 267 (1910); **Ranta Const., Inc. v. Anderson**, 190 P.3d 835 (Colo. App. 2008).

2. If a contract does not contain an express term setting the time for performance, then the time for performance is a reasonable time after entry into the contract. **Twin Lakes Reservoir & Canal Co. v. Bond**, 156 Colo. 433, 399 P.2d 793 (Colo. 1965).

3. What is a reasonable time for performance of a contract depends upon the particular facts and circumstances of each case and rests largely in the discretion of the finder of fact. **Larimer v. Salida Granite Corp.**, 112 Colo. 598, 153 P.2d 998 (1944).

## 30:15 CONTRACT PERFORMANCE—CONDITIONS PRECEDENT

A contract may include one or more conditions precedent. A condition precedent is an event that must occur before performance under a contract becomes due.

### Notes on Use

See the Notes on Use to Instructions 30:10 and 30:12.

### Source and Authority

1. This instruction is supported by the Restatement: "A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981). *See also Daybreak Constr. Specialties, Inc. v. Saghatoleslami*, 712 P.2d 1028, 1031 (Colo. App. 1985) ("When the obligations of a contract for sale and purchase of land are mutual and concurrent [i.e., the performance of each is a condition precedent to the obligation to perform the other], so long as one party makes no tender of deed and the other no offer of payment, neither is in default."); RESTATEMENT (SECOND) OF CONTRACTS § 225 (1981).

2. Principles of conditions precedent are set forth in 8 CATHERINE A. McCauliff, CORBIN ON CONTRACTS § 30.7 (Joseph M. Perillo ed., rev. ed. 1999) (considering the occurrence or nonoccurrence of any condition precedent under certain circumstances). Conditions precedent must be specifically pleaded. C.R.C.P. 9(c). For authority considering conditions precedent, see *Western Distributing Co. v. Diodosio*, 841 P.2d 1053 (Colo. 1992) (defendant had received substantially all the benefit expected from the contract and therefore plaintiffs had substantially performed their obligations and could assert breach of contract claim against defendant, even though not every obligation was performed); and *D.R. Horton, Inc.-Denver v. Bischof & Coffman Construction, LLC*, 217 P.3d 1262 (Colo. App. 2009) (trial court erred in instructing jury that general contractor could not recover damages for breach of contract from subcontractors if they found subcontractors had substantially performed). Whether a breach of contract is material and therefore excuses the other party from performance is generally a question of fact. *Blood v. Qwest Servs. Corp.*, 224 P.3d 301 (Colo. App. 2009), *aff'd on other grounds*, 252 P.3d 1071 (Colo. 2011) (whether third-party plaintiff had materially breached or not substantially performed its contract with third-party defendant a question for jury); *Morris v. Belfor USA Group, Inc.*, 201 P.3d 1253 (Colo. App. 2008); *Kaiser v. Market Square Disc. Liquors, Inc.*, 992 P.2d 636 (Colo. App. 1999) (material breach by a party deprives that party of the right to demand performance by the other party).

3. Generally, unless unequivocal language mandates otherwise, a contractual clause will be interpreted as a promise rather than as a condition precedent. **Main Elec., Ltd. v. Printz Servs. Corp.**, 980 P.2d 522 (Colo. 1999).

### 30:16 CONTRACT PERFORMANCE—IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING—NON-INSURANCE CONTRACT

Every contract requires the parties to act in good faith and to deal fairly with each other in performing or enforcing the express terms of the contract.

A party performs a contract in good faith when (his) (her) (its) actions are consistent with the agreed common purpose and with the reasonable expectations of the parties. The duty of good faith and fair dealing is breached when a party acts contrary to that agreed common purpose and the parties' reasonable expectations.

#### Notes on Use

None.

#### Source and Authority

1. This instruction is supported by **Amoco Oil Co. v. Ervin**, 908 P.2d 493 (Colo. 1995).

2. Every contract in Colorado includes an implied duty of good faith and fair dealing. **McDonald v. Zions First Nat'l Bank, N.A.**, 2015 COA 29, ¶ 66, 348 P.3d 957; **Platt v. Aspenwood Condo. Ass'n, Inc.**, 214 P.3d 1060 (Colo. App. 2009). For a discussion as to the existence and scope of the duty of good faith and fair dealing implied in every contract, see **Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.**, 872 P.2d 1359 (Colo. App. 1994) (when one party uses discretion conferred by contract to act dishonestly or to act outside of accepted commercial practices to deprive the other party of the benefit of the contract, the contract is breached). *See also* **Sinclair Transp. Co. v. Sandberg**, 2014 COA 76M, ¶ 52, 350 P.3d 924 (where a contract is silent, a court may imply a reasonable term to give effect to the expectation of the parties when they entered the agreement); **Newflower Mkt., Inc. v. Cook**, 229 P.3d 1058 (Colo. App. 2010) (no breach of implied covenant of good faith for refusing to negotiate or consent to deposit money into specific account when contract did not contemplate either action); **New Design Constr. Co., Inc. v. Hamon Contractors, Inc.**, 215 P.3d 1172 (Colo. App. 2008) (implied covenant of good faith and fair dealing may be relied upon where one party has discretion with respect to performance of specific terms of the contract); *accord* **Lutfi v. Brighton Cmty. Hosp. Ass'n**, 40 P.3d 51 (Colo. App. 2001); **O'Reilly**

**v. Physicians Mut. Ins. Co.**, 992 P.2d 644 (Colo. App. 1999); **Crown Life Ins. Co. v. Haag Ltd. P'ship**, 929 P.2d 42 (Colo. App. 1996).

3. The existence of a contract is a necessary predicate to a claim for breach of the implied duty of good faith and fair dealing. **Beal Corp. Liquidating Trust v. Valleylab, Inc.**, 927 F. Supp. 1350 (D. Colo. 1996). A party, therefore, cannot rely on the implied covenant of good faith and fair dealing as a basis for claiming that another party has wrongfully failed or refused to enter into a contract.

4. The good faith performance doctrine serves to effectuate the intentions of the parties or to honor their reasonable expectations. **Bayou Land Co. v. Talley**, 924 P.2d 136 (Colo. 1996); **Amoco Oil Co.**, 908 P.2d at 498; **State Farm Mut. Auto. Ins. Co. v. Nissen**, 851 P.2d 165 (Colo. 1993); **Davis v. M.L.G. Corp.**, 712 P.2d 985 (Colo. 1986); **ADT Sec. Servs., Inc. v. Premier Home Prot., Inc.**, 181 P.3d 288 (Colo. App. 2007) (no breach of duty of good faith and fair dealing where other party's conduct was not contrary to claimant's justified expectations).

5. The reasonable expectations doctrine applies to all contracts, including those free from ambiguity, in order to effectuate the parties' intentions. *See* **Amoco Oil Co.**, 908 P.2d at 498; **Nissen**, 851 P.2d 166–67; **Simon v. Shelter Gen. Ins. Co.**, 842 P.2d 236 (Colo. 1992); **Davis**, 712 P.2d at 988–90; *cf.* **Dupre v. Allstate Ins. Co.**, 62 P.3d 1024 (Colo. App. 2002); **Spaur v. Allstate Ins. Co.**, 942 P.2d 1261 (Colo. App. 1996); **Shean v. Farmers Ins. Exch.**, 934 P.2d 835 (Colo. App. 1996) (doctrine of reasonable expectations applies only if the contract is ambiguous).

6. Public policy considerations favor the honoring of the reasonable expectations of the parties to a contract. Honoring those expectations is consistent with numerous other interpretive rules pertaining to contracts, including: words are given effect according to their ordinary or popular meaning; the scope of the agreement is not determined in a vacuum, but instead with reference to extrinsic circumstances; the interpretation which makes a contract fair and reasonable is selected over that which yields a harsh or unreasonable result; and contracts are to be construed so as to effectuate the parties' intentions. **Davis**, 712 P.2d 990–91.

7. Application of the reasonable expectation doctrine often fails to give effect to some hornbook rules governing the construction of contracts, including the tenets that a party is presumed to know the content of a contract signed by him, that contracts free from ambiguity are to be enforced as written, and that specific clauses control the effect of general clauses. *See* **Amoco Oil Co.**, 908 P.2d at 498; **Davis**, 712 P.2d at 990; *cf.* **Spaur**, 942 P.2d 1265; **Shelter Mut. Ins. Co. v. Breit**, 908 P.2d 1149 (Colo. App. 1995) (doctrine of reasonable expectations supplements, but does not substitute for, the rule that insurance poli-

cies are to be construed according to well-settled principles of contract construction).

8. The test of the meaning of a word or phrase under the reasonable expectations doctrine is what an ordinary lay person would have understood it to mean. **Breit**, 908 P.2d at 1152.

9. The implied duty of good faith and fair dealing does not inject new substantive terms or conditions into a contract. **City of Boulder v. Pub. Serv. Co.**, 996 P.2d 198 (Colo. App. 1999); **Soderlun v. Pub. Serv. Co.**, 944 P.2d 616 (Colo. App. 1997); *see also* **Amoco Oil Co.**, 908 P.2d at 498 (“[The covenant] will not contradict terms or conditions for which a party has bargained.”); **Miller v. Bank of N.Y. Mellon**, 2016 COA 95, ¶ 46, 379 P.3d 342 (implied duty of good faith and fair dealing could not be used to require bank to negotiate changes to loan agreement.).

10. In contrast to a claim for bad faith breach of insurance contract addressed in Chapter 25, which gives rise to liability in tort and a broader range of damages, breach of the implied duty of good faith and fair dealing in a non-insurance context is a contract claim subject to the traditional limitations on contract remedies. These include the rule that punitive damages are not recoverable for breach of an ordinary contract. **Mortg. Fin., Inc. v. Podleski**, 742 P.2d 900 (Colo. 1987). *See, generally*, the instructions on damages set forth in Part E of this chapter.

11. In deciding whether a party violated the obligation to act in good faith, the court must determine whether the underlying contract provision allows for the exercise of discretion in its performance. The concept of discretion in performance refers to one party’s power after contract formation to set or control the terms of performance. **Amoco Oil Co.**, 908 P.2d at 498; **Newflower Mkt., Inc.**, 229 P.3d at 1064 (refusing to consent to deposit money into specific account or negotiate for same when contract did not contemplate either action not breach of good faith duty); **New Design Constr. Co., Inc.**, 215 P.3d at 1182 (contractor given discretion in contract to schedule work of subcontractor). Discretion occurs when the parties, at formation, defer a decision regarding performance terms of the contract. **Amoco Oil Co.**, 908 P.2d at 499; *accord* **City of Golden v. Parker**, 138 P.3d 285 (Colo. 2006); **Lutfi**, 40 P.3d at 59; **O’Reilly**, 992 P.2d at 646.

12. While the good faith performance doctrine may be used to protect a “weaker” party from a “stronger” party, in this context weakness and strength do not refer to the relative bargaining power of the parties. Rather, even in arms-length transactions between sophisticated parties, there may be an agreement to confer control of performance of a contract term on one of the parties. *See, e.g.*, **City of Golden**, 138 P.3d 292–93; **Mahan v. Capitol Hill Internal Med., P.C.**, 151 P.3d 685 (Colo. App. 2006). The dependent party must then rely on the party

in control to exercise good faith in the exercise of its discretion. **Amoco Oil Co.**, 908 P.2d at 498–99.

13. The duty of good faith and fair dealing may apply to the enforcement of a contract as well as its performance. When applied in the enforcement context, it bars dishonest conduct such as raising an imaginary dispute, asserting an interpretation contrary to one's own understanding, or falsification of facts. **Bayou Land Co.**, 924 P.2d at 155 n.28 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e (1981)); see also **Ranta Constr., Inc. v. Anderson**, 190 P.3d 835 (Colo. App. 2008) (in case decided under UCC's good faith and fair dealing provision, buyer had no claim for breach of warranty when seller of product has right to cure defects and buyer interferes with that right by foreclosing it prematurely).

14. The implied covenant of good faith and fair dealing cannot be invoked to bar a party from bringing a claim based on a disagreement regarding contract terms. **Bayou Land Co.**, 924 P.2d at 154.

15. The implied duty of good faith and fair dealing does not apply to the termination of an at-will employment contract. **Soderlun**, 944 P.2d at 623.

16. While an implied duty of good faith and fair dealing is inherent in every contract, the parties to a contract may also include an express covenant of good faith and fair dealing as a contract term. **Decker v. Browning-Ferris Indus. of Colo., Inc.**, 931 P.2d 436 (Colo. 1997). However, absent an agreement by the parties, no industry-specific standard will be implied into a contract. **BSLNI, Inc. v. Russ T. Diamonds, Inc.**, 2012 COA 214, ¶ 22, 293 P.3d 598.

## 30:17 CONTRACT PERFORMANCE—ASSIGNMENT

(Plaintiff) (Defendant), who was not a party to the original contract, may bring a claim for breach of contract if rights under the contract were (intended to be) transferred to (him) (her) (it) by (*insert name of authorized assignor*). This transfer is referred to as an assignment.

(You may consider the entire transaction and the conduct of the parties to the assignment in determining the intent to transfer contract rights.)

(A transfer of contract rights does not have to be written. A transfer of contract rights may be oral or may be implied by the conduct of the parties to the assignment.)

### Notes on Use

1. This instruction should be used only if the agreement does not specifically prohibit assignment of rights.
2. The second and third sentences should be used only if the validity of the assignment is contested.

### Source and Authority

1. This instruction is supported by **Parrish Chiropractic Centers, P.C. v. Progressive Casualty Insurance Co.**, 874 P.2d 1049, 1052 (Colo. 1994) (“Contract rights generally are assignable, except where assignment is prohibited by contract or by operation of law or where the contract involves a matter of personal trust or confidence.”); **Matson v. White**, 122 Colo. 79, 84, 220 P.2d 864, 867 (1950) (“consent of the other contracting party is not essential to the validity of an assignment”); and **Temple Hoyne Buell Foundation v. Holland & Hart**, 851 P.2d 192, 197 (Colo. App. 1992) (a party may assign his obligations “only if such assignment would not impair plaintiffs’ rights” (citing RESTATEMENT (SECOND) OF CONTRACTS § 317(2) (1981))).

2. An attempt to assign rights in a *future* contract, however, is not enforceable against the obligor. **Allstate Ins. Co. v. Med. Lien Mgmt., Inc.**, 2015 CO 32, ¶ 13, 348 P.3d 943 (“a purported assignment of a right expected to arise under a contract not yet in existence operates only as a promise to assign the right when it arises and as a power to enforce it . . . [and] does not constitute an assignment of future or after-acquired rights so as to be effective against the promisor’s obligor”).

3. "An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." RESTATEMENT (SECOND) OF CONTRACTS § 317(1) (1981).

## C. DEFENSES

### Introductory Note

- 30:18 Defense—Fraud in the Inducement
- 30:19 Defense—Undue Influence
- 30:20 Defense—Duress
- 30:21 Defense—Minority
- 30:22 Defense—Mental Incapacity
- 30:23 Defense—Impossibility of Performance
- 30:24 Defense—Inducing a Breach by Words or Conduct
- 30:25 Defense—Waiver
- 30:26 Defense—Statute of Limitations
- 30:27 Defense—Cancellation by Agreement
- 30:28 Defense—Accord and Satisfaction (Later Contract)
- 30:29 Defense—Novation

### Introductory Note

1. Mutual mistake may be grounds for rescission of a contract. Rescission is an equitable claim that generally is not presented for a jury determination. *See* **England v. Amerigas Propane**, 2017 CO 55, ¶¶ 19–22, 395 P.3d 766 (court concluded that parties were mutually mistaken about existence of scapular fracture at the time they settled the case); **Carpenter v. Hill**, 131 Colo. 553, 283 P.2d 963 (1955); **Ramstetter v. Hostetler**, 2016 COA 81, ¶ 46, 411 P.3d 1043 (affirming trial court’s judgment rescinding contract where the parties mistakenly believed that joint tenancy could be severed only by mutual agreement). The Committee therefore determined an instruction on mutual mistake is not necessary. *See generally* **Casey v. Colo. Higher Educ. Ins. Benefits All. Trust**, 2012 COA 134, ¶ 68, 310 P.3d 196; **Snow Basin, Ltd. v. Boettcher & Co.**, 805 P.2d 1151 (Colo. App. 1990).

2. A unilateral mistake of fact or law is generally not a defense to a breach of contract claim. *See* **Kuper v. Scroggins**, 127 Colo. 416, 257 P.2d 412 (Colo. 1953). *But see* **In re Marriage of Manzo**, 659 P.2d 669 (Colo. 1983) (in *dicta*, supreme court suggests a unilateral mistake may justify rescission where one party knows of the mistake and takes advantage of it); **Sumerel v. Goodyear Tire & Rubber Co.**, 232 P.3d 128 (Colo. App. 2009) (where one party knew arithmetical calculation of damages was erroneous, risk of mistake did not rest with other party, and the agreement made based on that calculation was unconscionable, agreement was unenforceable (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 153–54 (1981))).

3. While equity recognizes an estoppel to claim damages, *see* **Mabray v. Williams**, 132 Colo. 523, 291 P.2d 677 (1955), the Committee determined that an instruction is not necessary. *See* **Sanger v. Larson Constr. Co.**, 126 Colo. 479, 251 P.2d 930 (1952) (plaintiff estopped to claim trespass by defendant); **Richmond v. Grabowski**, 781 P.2d 192, 195 (Colo. App. 1989) (“the party to be estopped [must know] the facts”); **Barker v. Jeremiasen**, 676 P.2d 1259 (Colo. App. 1984) (citing elements of estoppel). If there is a dispute as to whether the plaintiff had sufficient knowledge of the defendant’s breach, this instruction must be appropriately modified. *See* **Cont’l W. Ins. Co. v. Jim’s Hardwood Floor Co.**, 12 P.3d 824 (Colo. App. 2000) (party to be estopped must know facts and party asserting estoppel must be ignorant of facts).

4. For a discussion of the elements necessary to establish the

equitable defense of estoppel by reason of delay or laches, see **Manor Vail Condominium Ass'n v. Town of Vail**, 199 Colo. 62, 604 P.2d 1168 (1980); **Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Associates**, 867 P.2d 70 (Colo. App. 1993); and **Extreme Construction Co. v. RCG Glenwood, LLC**, 2012 COA 220, ¶ 29, 310 P.3d 246.

5. The defense of unconscionability is an equitable defense to be decided by the Court. Therefore, the Committee determined that an instruction was not necessary. For a discussion as to whether an agreement constitutes an adhesion contract, see **Ad Two, Inc. v. City & County of Denver**, 983 P.2d 128 (Colo. App. 1999), *aff'd on other grounds*, 9 P.3d 373 (Colo. 2000).

6. Generally, contracts in contravention of public policy are void and unenforceable. See **Pierce v. St. Vrain Valley Sch. Dist. RE-1J**, 981 P.2d 600 (Colo. 1999); see also **Bailey v. Lincoln Gen. Ins. Co.**, 255 P.3d 1039 (Colo. 2011) (insurance provision of automobile rental agreement excluding coverage for intentional criminal acts was not void as against public policy); **Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, L.L.C.**, 176 P.3d 737 (Colo. 2007) (contract for renewal authority to acquire certain property by eminent domain condemnation if necessary not void); **Grippin v. State Farm Mut. Auto. Ins. Co.**, 2016 COA 127, ¶ 26, 409 P.3d 529 (insurance provision limiting coverage to relatives who reside "primarily" with the named insured was void as an improper limitation on statutorily mandated coverage); **Rocky Mountain Nat. Gas, LLC v. Colo. Mountain Junior Coll. Dist.**, 2014 COA 118, ¶ 20, 385 P.3d 848 (lease, which contained term that exceeded defendant's statutory authority, was void); **Weize Co. v. Colo. Reg'l Constr., Inc.**, 251 P.3d 489 (Colo. App. 2010) (affirmative defense of illegality of contract with unlicensed plumber); **Amedeus Corp. v. McAllister**, 232 P.3d 107 (Colo. App. 2009) (agreement to pay fees for real estate work to unlicensed party illegal and unenforceable); **Platt v. Aspenwood Condo. Ass'n**, 214 P.3d 1060 (Colo. App. 2009) (where a statute expressly forbids sale of unit without vote of other owners and imposes a penalty for entering into a forbidden contract, the contract is void ab initio); **Dinosaur Park Invs. L.L.C. v. Tello**, 192 P.3d 513 (Colo. App. 2008) (contract for installment sale was illegal for failure to name public trustee, and issue properly raised as affirmative defense); **Shotkoski v. Denver Inv. Grp., Inc.**, 134 P.3d 513 (Colo. App. 2006) (agreement to compensate unlicensed real estate broker is illegal and unenforceable); **Harding v. Heritage Health Prods. Co.**, 98 P.3d 945 (Colo. App. 2004) (equitable doctrines may not be used to enforce illegal or void agreement);

**Equitex, Inc. v. Ungar**, 60 P.3d 746 (Colo. App. 2002) (neither party to a contract may waive objections based on public policy or illegality and courts will not enforce contracts that violate public policy even if failure to do so is unfair). However, a party to an illegal contract cannot rely on the illegality of a contract to defeat a claim by a nonparty to the contract. **Bebo Constr. Co. v. Mattox & O'Brien, P.C.**, 998 P.2d 475 (Colo. App. 2000) (party who entered into illegal joint venture agreement with law firm could not rely on illegality of joint venture to defeat claim by third-party). Similarly, a nonparty to a contract cannot raise the defense of illegality when sued by a party to an illegal contract. **Oppenheimer Indus., Inc. v. Firestone**, 39 Colo. App. 448, 569 P.2d 334 (1977) (suit for real estate commission).

7. Colorado Rule of Professional Conduct 1.8 is an expression of public policy, the violation of which may render an agreement unenforceable. **Calvert v. Mayberry**, 2019 CO 23, ¶ 49, 440 P.3d 424, 435 (“[W]e hold that when an attorney enters in a contract without complying with Rule 1.8(a), the contract is presumptively void as against public policy; however, the attorney may rebut that presumption by showing that, under the circumstances, the contract does not contravene the public policy underlying Rule 1.8(a).”).

8. Whether exculpatory clauses are sufficient and valid is a question of law for the court. Four factors are considered by courts when evaluating the enforceability of exculpatory clauses: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties was expressed in clear and unambiguous language. **McShane v. Stirling Ranch Prop. Owners Ass’n, Inc.**, 2017 CO 38, ¶ 13, 393 P.3d 978; *see also* **Stone v. Life Time Fitness, Inc.**, 2016 COA 189M, ¶ 35, 411 P.3d 225 (release language in membership agreement was ambiguous and accordingly did not bar claim for injury sustained while washing hands in restroom).

9. Whether a contract disclaimer is clear and conspicuous is a question of law for the court. **Cummings v. Arapahoe Cty. Sheriff’s Dep’t**, 2018 COA 136, ¶ 56, 440 P.3d 1179 (“when a clear and conspicuous disclaimer informs an employee that he or she cannot reasonably rely on termination procedures or substantive restrictions on termination contained in an employee manual, a claim based on an implied contract claim ordinarily fails as a matter of law”).

10. A contract may be unenforceable in some circumstances

when it is so unfair as to be unconscionable. **Davis v. M.L.G. Corp.**, 712 P.2d 985 (Colo. 1986) (rental insurance agreement excluding coverage when car used in the commission of a crime unconscionable, based on parties' expectations and overreaching by rental agency); **Planned Pethood Plus, Inc. v. KeyCorp, Inc.**, 228 P.3d 262 (Colo. App. 2010) (prepayment penalty clause in promissory note not unconscionable where amount of penalty was modest and language in note was prominent); cf. **Bailey**, 255 P.3d at 1057 (provision in widely used standard rental agreement avoiding coverage when car used in commission of a crime not unconscionable and did not violate the reasonable expectations of the insured).

11. A limitation of liability term in a contract is not enforceable where the party seeking to enforce the limitation has willfully and wantonly breached the contract. **Core-Mark Midcontinent, Inc. v. Sonitrol Corp.**, 2012 COA 120, ¶ 16, 300 P.3d 963 (whether a breach is willful and wanton presents a question of fact for the jury); **Taylor Morrison of Colo., Inc., v. Terracon Consultants, Inc.**, 2017 COA 64, ¶ 10, 410 P.3d 767 (jury concluded that defendant's conduct was not "willful and wanton" and court enforced clause limiting defendant's liability for breach).

12. The defense of noncooperation in an insurance context must be pleaded as either an affirmative defense or a failure of condition precedent. **Soicher v. State Farm Mut. Auto. Ins. Co.**, 2015 COA 46, ¶ 2, 351 P.3d 559 (holding that failure to cooperate may not be raised for first time in a proposed verdict form).

**30:18 DEFENSE—FRAUD IN THE INDUCEMENT**

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on the plaintiff's claim of breach of contract if the affirmative defense of fraud is proved. This defense is proved if you find all of the following:

1. The plaintiff (concealed a past or present fact) (failed to disclose a past or present fact that the plaintiff had a duty to disclose) (made a false representation of a past or present fact);
2. The fact was material;
3. The defendant entered into the (claimed) contract relying on the assumption that the ([concealed] [undisclosed] fact did not exist or was different from what it actually was) (falsely stated fact was true);
4. The defendant's reliance was justified;
5. The defendant's reliance caused (him) (her) (damages) (losses); and
6. The defendant has returned or offered to return to plaintiff *(describe what, if anything, the defendant would be legally obligated to return to the plaintiff in order to prevent the defendant from being unjustly enriched)*.

**Notes on Use**

1. For cases involving contracts for the sale of goods, see section 4-2-721, C.R.S.
2. Use whichever parenthesized portions are appropriate in light of the evidence in the case.
3. Omit any numbered paragraphs, the facts of which are not in dispute.
4. If the contract is wholly executory, paragraph 6 of this instruc-

tion should be omitted. Also, in certain cases, the defendant may not be under a duty to return what he or she has received from the plaintiff or its value. In those cases, paragraph 6 should be omitted or modified appropriately, depending on the evidence in the case.

5. When this instruction is given, those instructions in Chapter 19 as would be appropriate in the light of the evidence in the case should also be given, including Instruction 19:3 (defining false representation).

### Source and Authority

1. This instruction is supported by **Trimble v. City & County of Denver**, 697 P.2d 716 (Colo. 1985); **Sears v. Hicklin**, 13 Colo. 143, 21 P. 1022 (1889); and RESTATEMENT (SECOND) OF CONTRACTS §§ 159–173 (1981). *See also* **Ice v. Benedict Nuclear Pharm., Inc.**, 797 P.2d 757 (Colo. App. 1990) (unless damages resulted from alleged misrepresentation, plaintiff's fraud is not a defense to a breach of contract claim).

2. For a discussion of rescission of insurance contract by reason of fraud in an insurance application, see **Silver v. Colorado Casualty Insurance Co.**, 219 P.3d 324 (Colo. App. 2009).

3. When one has been induced to enter into a contract because of a material misrepresentation on the part of the other party, that person may have several courses of action open to him or her, depending on the particular facts. *See generally* W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 105 (5th ed. 1984). Among other courses of action where both sides have fully performed the contract, the one defrauded may:

- a. As a plaintiff, affirm the contract, and sue at law for damages in a tort action for deceit, *see, e.g.*, **Club Matrix, LLC v. Nassi**, 284 P.3d 93 (Colo. App. 2011), or
- b. As a plaintiff, disaffirm the contract, tender back what the plaintiff has received, and sue to recover what he or she gave as performance (rescission and restitution), or
- c. As a defendant in a breach of contract action, he or she may take course a or b above as a counterclaim. If the defendant chooses to rescind and seek restitution as a counterclaim, the defendant may also use the fraud as a defense to the plaintiff's claim for breach of contract. If the defendant chooses to counterclaim for deceit, the fraud may not be used as a defense to the damage claim (except as a counterclaim), since by suing for deceit the defendant affirms the contract and is liable to render to the plaintiff what is due under the contract.

4. Where the one defrauded has not fully performed, he or she may:

- a. As a plaintiff, disaffirm any obligation to perform the

contract further, but affirm the contract to the extent he or she has performed it and sue for damages (if any) in a common law action for deceit, *see, e.g., Ackmann v. Merchants Mortg. & Trust Corp.*, 659 P.2d 697 (Colo. App. 1982), *rev'd on other grounds sub nom. Kopeikin v. Merchants Mortg. & Trust Corp.*, 679 P.2d 599 (Colo. 1984), or

- b. As a plaintiff, disaffirm the contract, tender back what he or she has received, and sue for rescission and restitution as above, or
- c. As a defendant in a breach of contract action, counterclaim for a or b above, or, if the contract is totally executory, simply use the fraud as a defense to any damages for breach.

5. Many cases have recognized the defrauded person's basic alternative remedies of rescission and restitution. *See W. Cities Broad., Inc. v. Schueller*, 849 P.2d 44 (Colo. 1993); *Martinez v. Affordable Housing Network, Inc.*, 109 P.3d 983 (Colo. App. 2004), *rev'd on other grounds*, 123 P.3d 1201 (Colo. 2005); *Sims v. Sperry*, 835 P.2d 565 (Colo. App. 1992); *Colo. Interstate Gas Co. v. Chemco, Inc.*, 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993); *see also Trimble*, 697 P.2d at 723; *Neiheisel v. Malone*, 150 Colo. 586, 375 P.2d 197 (1962); *Aaberg v. H.A. Harman Co.*, 144 Colo. 579, 358 P.2d 601 (1960). On many occasions, the courts have also stated the rule that the defrauded person, having learned of the fraud, must, if that person elects to rescind, give notice promptly of his or her intention to do so. *See, e.g., Gerbaz v. Hulsey*, 132 Colo. 359, 288 P.2d 357 (1955); *Tisdell v. Central Sav. Bank & Trust Co.*, 90 Colo. 114, 6 P.2d 912 (1931); *Elk River Assocs. v. Huskin*, 691 P.2d 1148 (Colo. App. 1984).

6. While a party electing to rescind a contract is required to give prompt notice of his or her election, a party who has been induced fraudulently to enter into two related contracts as part of the same general transaction need not elect the same remedy for both contracts. That party may elect to affirm one and sue for damages in deceit, and rescind the other and seek restitution for any consideration paid or rendered. A party should not be required to elect the same remedy for both contracts unless necessary to prevent double recovery or because the assertion of different remedies would be so inconsistent that the assertion of one would necessarily be a repudiation of the other. *Stewart v. Blanning*, 677 P.2d 1382 (Colo. App. 1984).

7. One who has been induced to enter into a contract with a third person because of the fraud of another may affirm the contract and sue the other for damages in deceit and may also sue the third person for damages for any breach of the contract by the third person. Because these remedies are not inconsistent in that they would not necessarily result in double recovery, the defrauded person need not make an election between the two. *Trimble*, 697 P.2d at 723–24.

8. Numbered paragraph 6 of this instruction states the rule of **Gerbaz**, 132 Colo. at 363, 288 P.2d at 359. When one uses fraud in the inducement as a defense to a breach of contract action that person is in effect claiming a right to “rescind” the contract and consider himself or herself discharged. The elements of proof of this defense are, therefore, the same as an action for rescission and restitution. The only difference is that if the defendant has not in any way rendered performance under the contract, he or she will not generally seek or be entitled to any restitution. *But see* **Murray v. Montgomery Ward Life Ins. Co.**, 196 Colo. 225, 584 P.2d 78 (1978) (applying these rules and the elements of this instruction to a life insurance contract, but requiring that the misrepresentation or concealment be made “knowingly”).

9. Even though the defendant may have received some performance from the plaintiff, the defendant is not always under a duty to return what, or the value of what, he or she received. *See* RESTATEMENT (SECOND) OF CONTRACTS § 384 (1981). While it “is the general rule that a party seeking to rescind a contract must return the opposite party to the position in which he was prior to entering into the contract . . . [that rule] is not a technical rule, but rather . . . is [an] equitable [one], and requires practicality in readjusting the rights of the parties. . . . The standard [to be] used is ‘substantial restoration of the status quo.’ . . . How [that] is to be accomplished, or indeed whether it can, is a matter . . . within the discretion of the trial court, under the facts as [they may be] found to exist by the trier of [facts].” **Smith v. Huber**, 666 P.2d 1122, 1124-25 (Colo. App. 1983).

10. Comparing the tort remedy of deceit and the remedy of rescission, whether used as a basis for a restitution action or a defense to a breach of contract action (this instruction), the basic difference in terms of what must be proved appears to be that, in a deceit action, the plaintiff must prove the defendant made the statement without an honest belief in the truth and with the intent that the plaintiff rely on the statement, whereas, in a rescission action, an innocent misrepresentation is sufficient. *See* **Bassford v. Cook**, 152 Colo. 136, 380 P.2d 907 (1963) (dictum, following what now appears to be the majority rule). *But see* **Murray**, 196 Colo. at 227-28, 584 P.2d at 80; **Coon v. Dist. Court**, 161 Colo. 211, 420 P.2d 827 (1966).

**30:19 DEFENSE—UNDUE INFLUENCE**

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of undue influence is proved. This defense is proved if you find both of the following:

1. At the time the defendant entered into the (claimed) contract, the defendant was not acting of (his) (her) own free will; and
2. The plaintiff caused the defendant's lack of free will by dominating the defendant through the use of words, conduct, or both.

The mere use of persuasion or argument to cause another to enter into a contract is not undue influence.

**Notes on Use**

1. This instruction should not be used in a case involving a confidential or fiduciary relationship. *See* Instructions 26:2, 26:3, and 34:16.
2. Use whichever parenthesized words are appropriate to the evidence in the case.
3. This instruction must be appropriately modified if the claimed undue influence was that of a third person. *See* RESTATEMENT (SECOND) OF CONTRACTS § 177(3) (1981).
4. The burdens of pleading and proving undue influence in an arm's length transaction are on the party asserting it. C.R.C.P. 8(c).

**Source and Authority**

This instruction is supported by *Lighthall v. Moore*, 2 Colo. App. 554, 31 P. 511 (1892); and RESTATEMENT (SECOND) OF CONTRACTS § 177(1) cmt. b (1981). *See also* cases cited in Source and Authority to Instruction 34:14.

**30:20 DEFENSE—DURESS**

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of duress is proved. This defense is proved if you find both of the following:

1. At the time the defendant entered into the (claimed) contract, the defendant was not acting of (his) (her) own free will; and

2. The plaintiff caused the defendant's lack of free will by (*insert the wrongful act or threat that the court has determined to be legally sufficient to constitute duress*).

**Notes on Use**

1. This instruction should not be used in a case involving a confidential or fiduciary relationship. See Instructions 26:2, 26:3 and 34:16.

2. Appropriate instructions defining other terms used in this instruction must also be given, e.g., an instruction or instructions relating to causation. See Instructions 9:18–9:20.

3. This instruction must be appropriately modified if the claimed duress was that of a third person. See RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (1981).

4. The burdens of pleading and proving duress in an arm's length transaction are on the party asserting it. C.R.C.P. 8(c). For this reason, the appropriate sections of Instruction 3:1 should be given reflecting the evidence in the case.

5. In cases involving the sale of goods, see section 4-2-302, C.R.S., which provides that the determination of unconscionability at the time the contract was made is a matter of law for the court. The parties may present evidence as to the commercial setting, purpose, and effect of the contract to aid the court in making its determination.

**Source and Authority**

1. This instruction is supported by **Barrows v. McMurtry Manufacturing Co.**, 54 Colo. 432, 131 P. 430 (1913) (no evidence that threats did in fact overcome defendant's free choice). See also **DeJean v. United Airlines, Inc.**, 839 P.2d 1153 (Colo. 1992) (if airline had

legal right to terminate employment of trainee pilots, threat to do so did not constitute duress); **Heald v. Crump**, 73 Colo. 251, 215 P. 140 (1923) (a threat to do what one may lawfully do does not constitute duress); **Miller v. Davis' Estate**, 52 Colo. 485, 122 P. 793 (1912) (defense of duress is lost if one accepts the benefits of the contract or remains silent for a considerable length of time after that person has had an opportunity to avoid or rescind the contract); **McClair v. Wilson**, 18 Colo. 82, 31 P. 502 (1892); **Adams v. Schiffer**, 11 Colo. 15, 17 P. 21 (1888) (duress exists where one person having control or possession of another's property refuses to surrender it to the owner except upon compliance with a demand that is unlawful); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379, 1384 (Colo. App. 1986) ("The threat of blacklisting an employee in an industry is a form of coercion that constitutes duress as a matter of law[.]"); **Wiesen v. Short**, 43 Colo. App. 374, 604 P.2d 1191 (1979) (insufficient evidence that any force or threats had actually subjugated the mind and will of the person against whom they were directed); RESTATEMENT (SECOND) OF CONTRACTS §§ 174–76 (1981).

2. As to what constitutes an improper threat, see **Vail/Arrowhead, Inc. v. District Court**, 954 P.2d 608 (Colo. 1998) (economic threats may give rise to duress so as to render contract voidable). *See also* **Premier Farm Credit, PCA v. W-Cattle, LLC**, 155 P.3d 504 (Colo. App. 2006) (threat by lender to call loan due if not renewed by borrower not cognizable as duress as a matter of law because lender had legal right to call loan due).

**30:21 DEFENSE—MINORITY**

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of minority is proved. This defense is proved if you find both of the following:

1. The defendant was under the age of 18 at the time the (claimed) contract was entered into; and
2. The defendant disaffirmed or rejected the [claimed] contract before becoming 18 or within a reasonable time after becoming 18.

**Notes on Use**

1. For "any legal contractual obligation," the age of competence is 18. § 13-22-101(1)(a), C.R.S.

2. The second numbered paragraph should be omitted if there is no dispute that the defendant is not yet 18 or if the only dispute is whether the defendant was 18 at the time the alleged contract was entered into.

3. If the contract is wholly executory, the second paragraph may not be applicable. *See Sipes v. Sipes*, 87 Colo. 301, 287 P. 284 (1930).

4. This instruction should be modified in cases relating to insurance, *see* § 10-4-104, C.R.S., or in cases involving contracts for the acquisition of necessities of life, *see Perkins v. Westcoat*, 3 Colo. App. 338, 33 P. 139 (1893).

**Source and Authority**

1. This instruction is supported by *Keser v. Chagnon*, 159 Colo. 209, 410 P.2d 637 (1966); and *Doenges-Long Motors, Inc. v. Gillen*, 138 Colo. 31, 328 P.2d 1077 (1958). *See also Fellows v. Cantrell*, 143 Colo. 126, 352 P.2d 289 (1960) (where the plaintiff was seeking to recover on a loan he had made to the defendant, the court held that the defendant's attempted disaffirmance at the age of 26 was not within a reasonable time after she reached majority).

2. Although the plaintiff may not be able to recover damages for breach of contract because of the defense of minority, the plaintiff may nonetheless be able to recover some damages on the theory of deceit, *see* Chapter 19, or on the theory of rescission and restitution. *Doenges-Long Motors, Inc.*, 138 Colo. at 38-39, 328 P.2d at 1081.

**30:22 DEFENSE—MENTAL INCAPACITY**

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of lack of mental capacity is proved. This defense is proved if you find at the time the defendant entered into the (claimed) contract, (he) (she) was suffering from an insane delusion that made (him) (her) unable to understand the terms or effect of the contract or to act rationally in the transaction.

**Notes on Use**

1. The appropriate sections of Instruction 3:1 should be given reflecting the evidence in the case.

2. This instruction should be used in conjunction with Instruction 34:12, which defines the term "insane delusion."

3. This instruction may be given in conjunction with Instruction 3:5 regarding presumptions. There is always, in civil as well as criminal actions, a presumption of sanity. **Hanks v. McNeil Coal Corp.**, 114 Colo. 578, 168 P.2d 256 (1946).

**Source and Authority**

This instruction is supported by **Hanks**, 114 Colo. at 588–89, 168 P.2d at 261–62. Accord **Forman v. Brown**, 944 P.2d 559 (Colo. App. 1997).

### 30:23 DEFENSE—IMPOSSIBILITY OF PERFORMANCE

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of impossibility of performance is proved. This defense is proved if you find all of the following:

1. An event, (*insert an appropriate description of the event, i.e., the Act of God, change of law, death of essential party, etc., on which the defendant relies*), occurred that could not reasonably be anticipated by the plaintiff and the defendant when they entered into the contract; and

2. The defendant did not cause the event; and

3. The event (made the defendant's performance of the contract physically impossible) (or) (made the defendant's performance impracticable because of [a change in law] or an extreme and unreasonable [difficulty,] [expense,] [risk of personal injury,] [or] [loss]).

#### Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute.

2. This instruction should not be given if the parties in their contract have impliedly or expressly dealt with the contingency giving rise to the claim of impossibility and have allocated the risk of the contingency taking place in a manner that would be inconsistent with paragraph 1 of this instruction. Neither should it be given unless the event that is claimed to have rendered the defendant's performance impossible would be sufficient for the defense as a matter of law.

3. An instruction or instructions related to causation may be used. See Instructions 9:18–9:20.

4. The appropriate sections of Instruction 3:1 should be given reflecting the evidence in the case.

5. For cases involving the sale of goods, see sections 4-2-613 to 4-2-

616, C.R.S., which deal, *inter alia*, with goods that suffer casualty without fault of either party before the risk of loss passes to the buyer; with substitute performance; and with a delay in delivery or nondelivery if performance as agreed upon has been made impracticable by the occurrence of a contingency, the nonoccurrence of which was a basic assumption on which the contract was made, or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

### Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF CONTRACTS §§ 261–66 (1981); **City of Littleton v. Employers Fire Insurance Co.**, 169 Colo. 104, 453 P.2d 810 (1969); and **Ruff v. Yuma County Transportation Co.**, 690 P.2d 1296 (Colo. App. 1984) (impossibility of performance is determined by whether “an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.”). *See also* **Town of Fraser v. Davis**, 644 P.2d 100 (Colo. App. 1982) (quoting and applying RESTATEMENT (SECOND) OF CONTRACTS § 266(2) (1981)); **Breeden v. Dailey**, 40 Colo. App. 70, 574 P.2d 508 (1977) (death of party); *see generally*, 14 JAMES P. NEHF, CORBIN ON CONTRACTS § 74.1 (Joseph M. Perillo ed., rev. ed. 2001).

2. Impossibility does not mean literal or strict impossibility but includes as well “impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.” **City of Littleton v. Employers Fire Ins. Co.**, 169 Colo. 104, 108, 453 P.2d 810, 812 (1969), specifically applying the RESTATEMENT OF CONTRACTS § 454 (1932), definition of impossibility.

3. A change in economic conditions, reducing the value of a contract to a party, is not sufficient to constitute the defense of impossibility, particularly when the changed circumstances are not so unforeseeable as to be outside the scope of the risks assumed by the party when entering into the contract. **Magnetic Copy Servs., Inc. v. Seismic Specialists, Inc.**, 805 P.2d 1161 (Colo. App. 1990); **Ruff**, 690 P.2d at 1298. Intervening governmental regulatory action that does not prohibit performance or require the issuance of a permit that is unobtainable, but rather is one that only renders performance more costly, does not constitute impossibility. **Seago v. Fellet**, 676 P.2d 1224, 1227 (Colo. App. 1983) (“[I]ncreased costs are not grounds for rescission of a contract.”); *see* **Colo. Performance Corp. v. Mariposa Assocs.**, 754 P.2d 401 (Colo. App. 1987) (same). However, governmental action that makes the performance of a contract illegal constitutes impossibility of performance. **Barrack v. City of Lafayette**, 829 P.2d 424 (Colo. App. 1991) (city was discharged from whatever contractual obligations it might have had to deliver untreated water when untreated water could no longer be legally supplied because of public health regulations), *rev’d on other grounds*, 847 P.2d 136 (Colo. 1993).

4. Concerning the destruction of the subject matter of the contract or a thing upon which the performance of a party depends, see RESTATEMENT (SECOND) OF CONTRACTS sections 262 through 263 (1981); and CORBIN ON CONTRACTS, *supra*, at sections 75.4–75.7.

5. The defense of impossibility of performance may be waived by the conduct of the parties. **Cornerstone Grp. XXII, L.L.C. v. Wheat Ridge Urban Renewal Auth.**, 151 P.3d 601 (Colo. App. 2006), *rev'd on other grounds*, 176 P.3d 737 (Colo. 2007).

**30:24 DEFENSE—INDUCING A BREACH BY WORDS OR CONDUCT**

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of inducing a breach of contract is proved. This affirmative defense is proved if you find both of the following:

1. By words or conduct, or both, the plaintiff caused the defendant not to perform (his) (her) (its) obligation as required by the (claimed) contract; and
2. The plaintiff actually knew, or knew there was a substantial likelihood, (his) (her) words or conduct, or both, would have that result.

**Notes on Use**

1. The appropriate sections of Instruction 3:1 should be given reflecting the evidence in the case.
2. For cases involving the sale of goods, see section 4-2-209, C.R.S., which provides that a party that has made a waiver affecting an executory portion of the contract may retract the waiver upon reasonable notification that strict performance will be required, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

**Source and Authority**

This instruction is supported by **Dreier v. Sherwood**, 77 Colo. 539, 238 P. 38 (1925). See also **Jones v. Adkins**, 34 Colo. App. 196, 526 P.2d 153 (1974); 13 SARAH HOWARD JENKINS, CORBIN ON CONTRACTS § 68.7 (Joseph M. Perillo ed., rev. ed. 2003).

**30:25 DEFENSE—WAIVER**

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on the plaintiff's claim of breach of contract if the affirmative defense of waiver is proved. This defense is proved if you find all of the following:

1. The plaintiff knew that the defendant (was required to perform) (had not performed) (his) (her) (its) contractual promise to *(insert appropriate description, e.g., "repair the car within 15 days")*;
2. The plaintiff knew that failure of the defendant to perform this contractual promise gave (him) (her) the right to *(insert appropriate description, e.g., "sue the defendant for damages")*;
3. The plaintiff intended to give up this right; and
4. The plaintiff voluntarily gave up this right.

**Notes on Use**

1. The appropriate sections of Instruction 3:1 should be given reflecting the evidence in the case.
2. Whenever this instruction is given, Instruction 30:31 (parties' intent), appropriately modified, should also be given.
3. For cases involving the sale of goods, see sections 4-2-209, 4-2-605 to 4-2-608, and 4-2-720, C.R.S., which deal, *inter alia*, with modification, rescission, waiver, the acceptance of goods, and the revocation of acceptance.
4. An effective waiver may be made by an authorized agent. **Stewart v. Breckenridge**, 69 Colo. 108, 169 P. 543 (1917). In such circumstances, this instruction must be modified appropriately. See Chapter 7 instructions as appropriate.

**Source and Authority**

1. The basic requirements of a waiver as set out in this instruction are supported by **Associates of San Lázaro v. San Lázaro Park Properties**, 864 P.2d 111 (Colo. 1993); **Ewing v. Colorado Farm**

**Mutual Casualty Co.**, 133 Colo. 447, 296 P.2d 1040 (1956); **General Accident Fire & Life Assurance Corp. v. Mitchell**, 128 Colo. 11, 259 P.2d 862 (1953); **Melssen v. Auto-Owners Insurance Co.**, 2012 COA 102, ¶ 39, 285 P.3d 328; **People ex rel. Metzger v. Watrous**, 121 Colo. 282, 215 P.2d 344 (1950); **Glover v. Innis**, 252 P.3d 1204 (Colo. App. 2011); **Universal Resources Corp. v. Ledford**, 961 P.2d 593 (Colo. App. 1998); **Tarco, Inc. v. Conifer Metropolitan District**, 2013 COA 60, ¶ 36, 316 P.3d 82 (bond requirement could not be waived by special district); **James H. Moore & Associates Realty, Inc. v. Arrowhead at Vail**, 892 P.2d 367 (Colo. App. 1994); **Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Associates**, 867 P.2d 70 (Colo. App. 1993); **Tripp v. Parga**, 847 P.2d 165 (Colo. App. 1992) (waiver may be implied from conduct of party); **Grimm Construction Co. v. Denver Board of Water Commissioners**, 835 P.2d 599 (Colo. App. 1992); **Western Cities Broadcasting, Inc. v. Schueller**, 830 P.2d 1074 (Colo. App. 1991) (no waiver of breach of lease provision), *aff'd on other grounds*, 849 P.2d 44 (Colo. 1993); **Ebrahimi v. E.F. Hutton & Co.**, 794 P.2d 1015 (Colo. App. 1989) (waiver of interest on promissory note); **Richmond v. Grabowski**, 781 P.2d 192 (Colo. App. 1989) (conduct not sufficiently free from ambiguity nor a clear enough manifestation of an intent to waive a benefit for there to have been a waiver as a matter of law); **Magliocco v. Olson**, 762 P.2d 681 (Colo. App. 1987) (waiver by tenant of right to receive certain notice under lease; intent to waive may be shown by conduct); **Vogel v. Carolina International, Inc.**, 711 P.2d 708 (Colo. App. 1985) (waiver of right to repossess collateral); **Barker v. Jeremiasen**, 676 P.2d 1259 (Colo. App. 1984); and **World of Sleep, Inc. v. Seidenfeld**, 674 P.2d 1005 (Colo. App. 1983).

2. Other cases recognizing the defense of waiver to an action for breach of contract are **Seale v. Bates**, 145 Colo. 430, 359 P.2d 356 (1961); **Gillett v. Young**, 45 Colo. 562, 101 P. 766 (1909); **McIntire v. Barnes**, 4 Colo. 285 (1878); and **Widner v. Walsh**, 3 Colo. 548 (1877). *See also* **Sung v. McCullough**, 651 P.2d 447 (Colo. App. 1982) (dealing with waiver of right to terminate a lease upon happening of certain condition).

3. A party may waive a provision that was included in a contract for that party's sole benefit, but may not waive a term that would deprive the nonwaiving party of some benefit. **Avicanna Inc. v. Mewhinney**, 2019 COA 129, ¶ 13 (enforcing unambiguous forum selection clause); **Fravert v. Fesler**, 11 Colo. App. 387, 53 P. 288 (1898).

4. Parties may agree to waive statutory rights or benefits, in the absence of statutory prohibitions or countervailing public policy. **Armed Forces Bank, N.A. v. Hicks**, 2014 COA 74, ¶ 28, 365 P.3d 378.

## 30:26 DEFENSE—STATUTE OF LIMITATIONS

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of the expiration of the statute of limitations is proved. This defense is proved if you find both of the following:

1. (*Describe the events that constituted the claimed breach*) occurred before (*insert the appropriate date*); and
2. Plaintiff knew, or should have known, with the exercise of reasonable diligence, of the existence of the (claimed) breach before (*insert the appropriate date*).

### Notes on Use

1. This instruction should only be given if there is a disputed question of fact that would be proper to submit to the jury, e.g., when the alleged breach occurred. However, when the material facts are undisputed and reasonable persons could not disagree about their import, the questions of when a claim accrues and, consequently, whether a claim is barred by the statute of limitations may be decided by the court as a matter of law. **Jackson v. Am. Family Mut. Ins. Co.**, 258 P.3d 328 (Colo. App. 2011).

2. If an event is claimed to have occurred that would toll the applicable statute and the facts are disputed, this instruction should be appropriately modified. *See, e.g.*, **First Interstate Bank of Denver, N.A. v. Berenbaum**, 872 P.2d 1297 (Colo. App. 1993) (burden on plaintiff to show that statute had been tolled).

### Source and Authority

1. This instruction is supported by section 13-80-108, C.R.S.; **Stice v. Peterson**, 144 Colo. 219, 355 P.2d 948 (1960); and **Koon v. Barmetler**, 134 Colo. 221, 301 P.2d 713 (1956).

2. Generally, in breach of contract actions, the statute of limitations is three years. § 13-80-101(1)(a), C.R.S.; *see* **Hersh Cos. Inc. v. Highline Village Assocs.**, 30 P.3d 221 (Colo. 2001) (breach of express warranty governed by three year statute for contracts); **Neuromonitoring Assocs. v. Centura Health Corp.**, 2012 COA 136, ¶ 20, 351 P.3d 486 (claim for amounts not liquidated or determinable within the meaning of § 13-80-103.5(1)(a) governed by the three year statute); **CAMAS Colo., Inc. v. Bd. of Cty. Comm'rs**, 36 P.3d 135 (Colo. App.

2001) (contractor's claims for breach of contract, *quantum meruit*, rescission and restitution for mistake were all governed by three year statute of limitations for contracts). *But see PorterCare Adventist Health Sys. v. Lego*, 2012 CO 58, ¶ 19, 286 P.3d 525 (six year statute regarding liquidated debt applied to action for unpaid balance for medical services); **BP Am. Prod. Co. v. Patterson**, 185 P.3d 811 (Colo. 2008) (six year limit applies to royalty obligations due under contract, and claim accrues on date the debt is due, not the date breach is discovered); **Jackson**, 258 P.3d at 331 (equitable action for reformation of a contract governed by the three year statute). The statute of limitations for contracts involving the sale of goods is the same. *See* § 4-2-725(1), C.R.S. (incorporating the period of limitation set out in section 13-80-101(1)(a), C.R.S.).

3. The defense of statute of limitations is an affirmative defense and the party asserting it has the burdens of pleading and proof. C.R.C.P. 8(c). *But see Berenbaum*, 872 P.2d at 1300–01 (when complaint shows on its face that a claim for fraud was brought more than three years after the alleged fraud and defendant has affirmatively pled the statute of limitations, the burden is on the plaintiff to show the statute has been tolled).

4. A new promise to pay may remove a defense based on the statute of limitations. "Since early common law, it has been universally accepted that a new promise to pay effectively removes the bar of any applicable statute of limitations by creating a new debt, with a new due date, and that a partial payment constitutes an implicit promise to pay." **Hutchins v. La Plata Mountain Res., Inc.** 2016 CO 45, ¶ 10, 373 P.3d 582, 585; *see also Van Diest v. Towle*, 116 Colo. 204, 179 P.2d 984 (1947).

5. In some instances, a demand or notice may be a condition precedent to creating a cause of action for breach of contract. *See, e.g., Stice*, 144 Colo. at 226–27, 355 P.2d at 953.

## 30:27 DEFENSE—CANCELLATION BY AGREEMENT

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of cancellation by agreement is proved. This defense is proved if you find both of the following:

1. The plaintiff and the defendant had entered into a contract; and
2. Before any party to the contract fully performed all (his) (her) (its) obligations under the contract, (the plaintiff and the defendant) (all the parties to the contract) agreed to cancel the contract.

An agreement to cancel a contract may be oral or in writing, or it may be implied from conduct of the parties.

### Notes on Use

1. This instruction should not be used when one party has fully performed or the contract is unilateral (promise for an act), rather than bilateral (mutual promises).
2. Use whichever parenthesized words are appropriate.
3. This instruction must be appropriately modified if either the plaintiff or the defendant was not an original party to the contract. Also, appropriate modifications must be made if the contract involved third-party beneficiaries. *See* 13 SARAH HOWARD JENKINS, CORBIN ON CONTRACTS § 67.8 (Joseph M. Perillo ed., rev. ed. 2003).
4. A rescission by mutual consent may be established by showing that the parties, by their conduct, impliedly agreed to abandon their contract. When there is sufficient evidence of such an implied agreement, this instruction should be appropriately modified. For abandonment, the acts and conduct of the parties must be positive, unequivocal, and inconsistent with any intent to continue to be bound by the contract, for example, by one party's regularly acquiescing in acts of the other party that are inconsistent with the continued existence of the contract. *In re Marriage of Young*, 682 P.2d 1233 (Colo. App. 1984) (discussing earlier cases and holding that the rules of abandonment are as ap-

plicable to antenuptial agreements as they are to other contracts); *see also* **Harrison v. Albright**, 40 Colo. App. 227, 577 P.2d 302 (1977) (evidence of abandonment insufficient; parties' conduct consistent with the continued existence of their contract).

### Source and Authority

1. This instruction is supported by **Western Air Lines v. Hollenbeck**, 124 Colo. 130, 235 P.2d 792 (1951) (citing earlier cases); and **Wallick v. Eaton**, 110 Colo. 358, 134 P.2d 727 (1943) (the discharge by one party of the other's obligation under a contract is sufficient consideration for the other's promise to discharge him). *See also* **Esecson v. Bushnell**, 663 P.2d 258, 261 (Colo. App. 1983) ("Mutual rescission requires assent . . . by *both* parties. . . . One party to an executory contract, in the absence of fraud or a special reason, cannot rescind. . . . [A]n agreement to rescind . . . requires a 'meeting of the minds' with 'the clear knowledge and understanding of the parties'. . . . Where mutual rescission is founded on the acts and conduct of the parties, . . . such acts must be 'inconsistent with the existence of the contract.'" (quoting **Western Air Lines**, 124 Colo. at 137–38, 235 P.2d at 796, and **Cruse v. Clawson**, 352 P.2d 989, 994 (Mont. 1960))).

2. In determining whether there is an agreement to rescind a contract, a meeting of the minds to rescind is evidenced by the objective acts, conduct and words of the parties and the subjective intent of the parties is immaterial. **Avemco Ins. Co. v. N. Colo. Air Charter, Inc.**, 38 P.3d 555 (Colo. 2002) (where insured voluntarily cashed premium check with knowledge that purpose of check was to effectuate a rescission of insurance policy, the subjective intent of insured not to rescind policy was immaterial and a rescission of the policy occurred); *see also* **Equitable Life Ins. Co. of Iowa v. Verploeg**, 123 Colo. 246, 227 P.2d 333 (1951).

3. For cases involving the sale of goods, see sections 4-2-209 (rescission, modification, and waiver) and 4-2-720, C.R.S. (effect of "cancellation" or "rescission" on claims for antecedent breach).

4. An agreement of rescission is an affirmative defense for which the party asserting it has the burdens of pleading and proof. C.R.C.P. 8(c).

5. For special requirements for a claim of renunciation of negotiable instruments, *see* **Glover v. Innis**, 252 P.3d 1204 (Colo. App. 2011) (defense of renunciation of a negotiable instrument under section 4-3-604, C.R.S., includes elements similar to but not the same as those of the affirmative defense of waiver).

### 30:28 DEFENSE—ACCORD AND SATISFACTION (LATER CONTRACT)

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of breach of contract if the affirmative defense of accord and satisfaction ("later contract") is proved. This defense is proved if you find all of the following:

1. After the defendant and the plaintiff had entered into the (claimed) contract in this case, they entered into a later contract;

2. The plaintiff and the defendant knew or reasonably should have known that the later contract cancelled or changed their remaining rights and duties under the (claimed) earlier contract(s); and

3. The defendant has fully performed the (duty) (duties) (he) (she) (it) agreed to perform under the later contract.

#### Notes on Use

1. Use whichever parenthesized words are appropriate to the evidence in the case.

2. Accord and satisfaction is an affirmative defense for which the party asserting it has the burdens of pleading and proof. C.R.C.P. 8(c). For ease of jury understanding of the affirmative defense of accord and satisfaction, the term "later contract" is suggested by the Committee.

3. Other instructions closely related to the subject matter of this instruction that may also be applicable or be more appropriate in certain cases are Instructions 30:8 (modification); 30:24 (inducing breach); 30:25 (waiver); and 30:27 (cancellation by agreement).

4. An executory accord, that is, a situation where the satisfaction promised under the new contract has not been rendered, does not bar recovery on the original obligation unless there is specific wording to that effect in the new contract. **Hinkle v. Basic Chem. Corp.**, 163 Colo. 408, 431 P.2d 14 (1967); **Bakehouse & Assocs., Inc. v. Wilkins**, 689 P.2d 1166, 1168 (Colo. App. 1984) ("An agreement to modify an existing agreement, i.e., an executory accord, does not extinguish the original obligation, but suspends performance of that obligation until the accord is breached or satisfied."). Consequently, in those cases, this

instruction should not be given unless the instruction is appropriately modified, and, as modified, there is sufficient supporting evidence. *But see Caldwell v. Armstrong*, 642 P.2d 47 (Colo. App. 1981) (because accord and satisfaction substantially performed, plaintiff only entitled to damages for remaining part of performance due under the accord). “The general rule is that the underlying duty or debt is not discharged until there is satisfaction on the accord. That is, the accord is executory.” *Id.* at 49.

5. This instruction has been drafted to cover the defense of accord and satisfaction generally. In many cases, however (see, e.g., cases cited below in Source and Authority), the situation will be one where it is claimed that the defendant made a payment to the plaintiff with the parties’ understanding that it was to be in full satisfaction of the contractual claim the plaintiff was asserting against the defendant. In those cases the more specific instruction, appropriately modified if necessary, approved by the court in **Gardner v. Mid-Continent Coal & Coke Co.**, 149 Colo. 122, 368 P.2d 204 (1962), should be used rather than this instruction.

6. This instruction is not applicable where the claim allegedly satisfied was for a liquidated debt and the only thing given in accord was a lesser sum of money. *See* 13 SARAH HOWARD JENKINS, CORBIN ON CONTRACTS § 69.1 (Joseph M. Perillo ed., rev. ed. 2003).

### Source and Authority

1. This instruction is supported by **United States Welding, Inc. v. Advanced Circuits, Inc.**, 2018 CO 56, ¶ 11, 420 P.3d 278, 281 (“A party to a contract may, of course, make an offer for an accord which, if accepted and satisfied, would absolve it of its obligations under the original contract.”); **Hudson v. American Founders Life Insurance Co.**, 151 Colo. 54, 377 P.2d 391 (1962) (citing earlier cases); **Pospicil v. Hammers**, 148 Colo. 207, 365 P.2d 228 (1961); and **Pitts v. National Independent Fisheries Co.**, 71 Colo. 316, 318, 206 P. 571, 571 (1922) (“In order to constitute an accord and satisfaction, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions.”). *See also Anderson v. Rosebrook*, 737 P.2d 417 (Colo. 1987) (holding that section 4-1-207, C.R.S., of the Uniform Commercial Code, dealing with reservation of rights, does not alter the common-law rule of accord and satisfaction quoted above); **R.A. Reither Constr., Inc. v. Wheatland Rural Elec. Ass’n**, 680 P.2d 1342 (Colo. App. 1984) (same).

2. This instruction is also supported by CORBIN ON CONTRACTS, *supra*, at § 69; and RESTATEMENT (SECOND) OF CONTRACTS § 281 (1981).

3. An accord and satisfaction based on a mistaken belief as to a ma-

terial fact is not effective. **Metro. State Bank v. Cox**, 134 Colo. 260, 302 P.2d 188 (1956).

4. For cases involving the sale of goods, see sections 4-2-209 (modification, rescission, and waiver) and 4-2-720, C.R.S. (effect of "cancellation" or "rescission" on claims for antecedent breach).

**30:29 DEFENSE—NOVATION**

**A novation is a new (valid) contract that replaces (a previous valid contract) (an existing obligation with a new obligation) (an original party with a new party). For there to be a novation, the original (obligation) (party) must be completely replaced.**

**Notes on Use**

1. Use whichever parenthesized words are appropriate to the evidence in the case.

2. Other instructions closely related to the subject matter of this instruction that may also be applicable or be more appropriate in certain cases are Instructions 30:8 (modification), 30:24 (inducing breach), 30:25 (waiver), and 30:27 (cancellation by agreement).

**Source and Authority**

1. This instruction is supported by **Phoenix Power Partners, L.P. v. Colorado Public Utilities Commission**, 952 P.2d 359 (Colo. 1998); **Moffat County State Bank v. Told**, 800 P.2d 1320 (Colo. 1990); **Haan v. Traylor**, 79 P.3d 114 (Colo. App. 2003); and **In re Buwana**, 338 B.R. 441 (Bankr. D. Colo. 2004).

2. Modification of a contract without the intent to replace the previous contract or obligation is not enough for novation. **Told**, 800 P.2d at 1323.

3. The parties need not expressly manifest their intent to accomplish novation, but novation may be inferred from facts and circumstances surrounding transaction. "It is not necessary that all these elements be established in writing or evidenced by express words but they may be proved as inferences from the acts and conduct of the parties and from other acts and circumstances." **Cardwell Inv. Co. v. United Supply & Mfg. Co.**, 268 F.2d 857, 859 (10th Cir. 1959).

## D. CONTRACT INTERPRETATION

### Introductory Note

30:30 Contract Interpretation—Disputed Term

30:31 Contract Interpretation—Parties' Intent

30:32 Contract Interpretation—Contract as a Whole

30:33 Contract Interpretation—Ordinary Meaning

30:34 Contract Interpretation—Use of Technical Words in a Contract

30:35 Contract Interpretation—Construction Against Drafter

30:36 Contract Interpretation—Specific and General Clauses

### Introductory Note

1. Generally, the interpretation of a written contract is a question of law for the court. **Klun v. Klun**, 2019 CO 46, ¶ 18, 442 P.3d 88, 92 (“contract interpretation presents a question of law that we review de novo”); **Sch. Dist. No. 1 v. Denver Classroom Teachers Ass’n**, 2019 CO 5, ¶ 14, 433 P.3d 38, 41 (“If the contract is complete and free from ambiguity, we deem it to represent the parties’ intent and enforce it based on the plain and generally accepted meaning of the words used.”); **Rocky Mountain Expl., Inc. v. Davis Graham & Stubbs LLP**, 2018 CO 54, ¶ 59, 420 P.3d 223; **Ad Two, Inc. v. City & County of Denver**, 9 P.3d 373 (Colo. 2000); **Radiology Profl Corp. v. Trinidad Area Health Ass’n**, 195 Colo. 253, 577 P.2d 748 (1978). The primary goal of interpreting a contract is to determine and give effect to the intent of the parties. **USI Props. East, Inc. v. Simpson**, 938 P.2d 168 (Colo. 1997). Where possible, the intent of the parties is to be determined from the language of the written contract itself. *Id.*

2. However, extrinsic evidence may be conditionally admitted to determine whether a contract is ambiguous. **Lazy Dog Ranch v. Telluray Ranch Corp.**, 965 P.2d 1229 (Colo. 1998) (rejecting rigid application of “four corners” rule); *accord* **East Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co.**, 109 P.3d 969 (Colo. 2005); **Lobato v. Taylor**, 71 P.3d 938 (Colo. 2002) (fact that extrinsic evidence may reveal ambiguities in contract is especially true when interpreting ancient document). Moreover, a contract must be interpreted in light of the context and circumstances of the transaction. **First Christian Assembly of God v. City & County of Denver**, 122 P.3d 1089 (Colo. App. 2005).

3. An insurance policy is a contract, and courts must enforce the plain language of a policy if it is unambiguous. **Craft v. Philadelphia Indem. Ins. Co.**, 2015 CO 11, ¶ 34, 343 P.3d 951. But ambiguous language must be construed in favor of the insured. **Renfandt v. N.Y. Life Ins. Co.**, 2018 CO 49, ¶ 18, 419 P.3d 576, 580 (“Where general language in an insurance contract is ambiguous, we construe it against the insurer.”).

4. The determination of whether an ambiguity exists in a written contract is also a question of law for the court. **Nat’l Cas. Co. v. Great Sw. Fire Ins. Co.**, 833 P.2d 741 (Colo. 1992). The provisions of a contract are ambiguous when they are susceptible to more than one reasonable interpretation. **Am. Family Mut. Ins. Co. v. Hansen**, 2016 CO 46, ¶ 23, 375 P.3d 115 (listing of

names of insureds on declarations page was unambiguous); **Union Ins. Co. v. Houtz**, 883 P.2d 1057 (Colo. 1994); **Ballow v. PHICO Ins. Co.**, 875 P.2d 1354 (Colo. 1993). The fact that the parties may disagree about the meaning of a term does not create an ambiguity. **Morley v. United Servs. Auto. Ass’n**, 2019 COA 169, ¶ 16, 465 P.3d 71; **Filatov v. Turnage**, 2019 COA 120, ¶ 14, 451 P.3d 1263, 1266 (“While the parties agree that these provisions are unambiguous, they disagree as to how they should be interpreted.”); **Mashburn v. Wilson**, 701 P.2d 67 (Colo. App. 1984). But the court may conclude that a contract is ambiguous even if the parties do not so argue. **Gagne v. Gagne**, 2014 COA 127, ¶¶ 50, 60, 338 P.3d 1152 (holding that terms in a contract were subject to “a myriad of reasonable interpretations”).

5. Consequently, the instructions in this Part D apply only in cases involving written contracts that are ambiguous, where reasonable persons might reasonably differ as to how the ambiguity should be resolved, or where the provisions of an oral contract are in dispute. Once a contract term is found to be ambiguous, its meaning is a question of fact to be determined in the same manner as other questions of fact. **Sch. Dist. No. 1**, 2019 CO 5, ¶ 14 (“‘[I]f it is fairly susceptible to more than one interpretation,’ [a] contract is ambiguous and ‘the meaning of its terms is generally an issue of fact to be determined in the same manner as other disputed factual issues.’” (quoting **Dorman v. Petrol Aspen, Inc.**, 914 P.2d 909, 912 (Colo. 1996))); **Dorman**, 914 P.2d at 912; **Preserve at the Fort, Ltd. v. Prudential Huntoon Paige Assocs.**, 129 P.3d 1015 (Colo. App. 2004); **D.C. Concrete Mgmt., Inc. v. Mid-Century Ins. Co.**, 39 P.3d 1205 (Colo. App. 2001). In those cases, it is the court’s function to determine what legal significance should be given to the various possible reasonable meanings from which the jury might determine the correct one, and the court should inform the jury in other instructions what they are to do if they find that the parties meant one interpretation as opposed to another.

6. The primary aim in contract interpretation is to determine what the parties intended, and every word in an instrument is to be given meaning if at all possible. **Fed. Deposit Ins. Corp. v. Fisher**, 2013 CO 5, ¶ 11, 292 P.3d 934.

7. For a discussion as to whether an objective or subjective standard should be applied to a contract that is to be completed to the satisfaction of one of the parties, see **Crum v. April Corp.**, 62 P.3d 1039 (Colo. App. 2002).

8. For a discussion of contractual conditions implied in fact

or by law, see **Lane v. Urgitis**, 145 P.3d 672 (Colo. 2006).

### 30:30 CONTRACT INTERPRETATION—DISPUTED TERM

(Plaintiff) (Defendant) disputes the meaning of the following term contained in the contract:

*(insert text of the term)*

(Plaintiff) (Defendant) claims that the term means *(insert proposed interpretation of the term)*. On the other hand, (plaintiff) (defendant) claims that the term means *(insert proposed interpretation of the term)*.

#### Notes on Use

1. When the court has determined the contract term is ambiguous or there is an oral contract where the terms are disputed, this instruction should be used. See Introductory Note to Part D of this Chapter; see also C.R.C.P. 38(a) (“all issues of fact shall be tried by a jury”).

2. This instruction supplements Instruction 2:1 in that it provides an introduction to the specific issues of the disputed terms of the contract and introduces the instructions to the jury for deciding those issues.

3. Instruction 30:31 (parties’ intent), must be given with this Instruction. Other instructions contained in Part D of this Chapter should be considered and used as necessary to instruct on the interpretation of the contract.

#### Source and Authority

This instruction is supported by **School District No. 1 v. Classroom Teachers Ass’n**, 2019 CO 5, ¶ 23, 433 P.3d 38, 43 (“We conclude that the court of appeals correctly decided that it was proper to submit the interpretation of the CBAs as an issue of fact to the jury because the CBAs are ambiguous regarding payment for ELA training.”); and **Dorman v. Petrol Aspen, Inc.**, 914 P.2d 909 (Colo. 1996) (the meaning of ambiguous contractual terms is generally an issue of fact).

### 30:31 CONTRACT INTERPRETATION—PARTIES' INTENT

The statements or conduct of the parties before any dispute arose between them is an indication of what the parties intended at the time the contract was formed.

To determine what the parties intended the terms of the contract to mean, you may also consider the language of the written agreement, the parties' negotiations of the contract, any earlier dealings between the parties, any reasonable expectations the parties may have had because of the promises or conduct of the other party, and any other facts or circumstances that existed at the time that the contract was formed.

#### Notes on Use

1. When the court has determined that a contract term is ambiguous or there is an oral contract where the terms are in dispute, contract interpretation is a jury issue and this instruction should be used. *See* Introductory Note to Part D of this Chapter.

2. If there is evidence in the case on other issues that would be improper for the jury to consider on the issue of interpretation, this instruction must be appropriately modified.

#### Source and Authority

1. This instruction is supported by **Condo v. Connors**, 266 P.3d 1110 (Colo. 2011) (in interpreting a contract the court's primary goal is to determine and effectuate the reasonable expectations of the parties); and **Draper v. DeFrenchi-Gordineer**, 282 P.3d 489 (Colo. App. 2011) (the primary goal of contract interpretation is to give effect to the intent of the parties, which is to be determined primarily from the language of the agreement). *See also* **Nahring v. City & County of Denver**, 174 Colo. 548, 484 P.2d 1235 (1971); **Thompson v. McCormick**, 149 Colo. 465, 370 P.2d 442 (1962); **Hammond v. Caton**, 121 Colo. 7, 212 P.2d 845 (1949) (any evidence showing the parties' intent is important in interpreting their contract); **Cohen v. Clayton Coal Co.**, 86 Colo. 270, 281 P. 111 (1929); **Erdenberger, Inc. v. Partek N. Am., Inc.**, 865 P.2d 850 (Colo. App. 1993); **Colo. Interstate Gas Co., Inc. v. Chemco, Inc.**, 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993); **Smith v. Long**, 40 Colo. App. 531, 578 P.2d 232 (1978); **Palipchak v. Kent Constr. Co.**, 38 Colo. App. 146, 554 P.2d 718 (1976); 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.16 (Joseph M. Perillo ed., rev. ed. 1998).

2. Extrinsic evidence of the parties' performance under a contract before any controversy arose is indicative of their intent at the time of contracting. **Klun v. Klun**, 2019 CO 46, ¶ 29, 442 P.3d 88, 94 ("Plaintiffs' contemporaneous actions and course of performance speak louder than their post-judgment words."); **Pepcol Mfg. v. Denver Union Corp.**, 687 P.2d 1310 (Colo. 1984).

3. Where the face of the contract shows a change, such as strikeouts, the terms may be proven by evidence outside the contract. **Hildebrand v. New Vista Homes II, LLC**, 252 P.3d 1159 (Colo. App. 2010). In cases involving an ambiguity in a written contract, the jury's function is to determine the intention of the parties as a question of fact. **Fire Ins. Exch. v. Rael**, 895 P.2d 1139 (Colo. App. 1995). Determining the parties' intent from the circumstances surrounding the execution of a contract is the primary method for determining the meaning of an ambiguous term.

4. The conduct of the parties may not be used to contradict the contract's plain, unambiguous meaning. **Great W. Sugar Co. v. White**, 47 Colo. 547, 108 P. 156 (1910).

5. Insurance policies are contracts, the unambiguous terms of which must be enforced as written, unless doing so would violate public policy. **Owners Ins. Co. v. Dakota Station II Condo. Ass'n**, 2019 CO 65, ¶ 31, 443 P.3d 47, 51 ("Insurance policies are contracts, interpretations of which we review de novo."); **Travelers Prop. Cas. Co. of Am. v. Stresscon Corp.**, 2016 CO 22M, ¶ 12, 370 P.3d 140; **Allstate Ins. Co. v. Huizar**, 52 P.3d 816 (Colo. 2002) (insurance contracts must be construed according to well-settled principles of contract interpretation); **Novell v. Am. Guar. & Liab. Ins. Co.**, 15 P.3d 775 (Colo. App. 1999); **Mt. Hawley Ins. Co. v. Casson Duncan Constr. Inc.**, 2016 COA 164, ¶ 15, 409 P.3d 619 (policy provision requiring insurer to pay "all costs" when defending a suit against its insured under reservation of rights was not ambiguous; insurer was required to pay taxable costs regardless of duty to indemnify). However, if an insurance contract is ambiguous, it must be construed against the insurer. **Cary v. United of Omaha Life Ins. Co.**, 108 P.3d 288 (Colo. 2005); **Cruz v. Farmers Ins. Exch.**, 12 P.3d 307 (Colo. App. 2000); **Bengtson v. USAA Prop. & Cas. Ins.**, 3 P.3d 1233 (Colo. App. 2000); **Novell**, 15 P.3d at 778. See Instruction 30:35 (construction against drafter).

6. Generally, unless unequivocal language mandates otherwise, a contractual clause will be interpreted as a promise rather than as a condition precedent. **Main Elec., Ltd. v. Printz Servs. Corp.**, 980 P.2d 522 (Colo. 1999).

7. A fundamental rule of contract interpretation is that the latest iteration of contractual terms controls. See **Fed. Deposit Ins. Corp. v. Fisher**, 2013 CO 5, ¶ 11, 292 P.3d 934.

## 30:32 CONTRACT INTERPRETATION—CONTRACT AS A WHOLE

The entire agreement (with any attachments) is to be considered in determining the existence or nature of the contractual duties. You should consider the agreement as a whole and not view clauses or phrases in isolation.

### Notes on Use

1. When the court has determined the contract term is ambiguous or there is an oral contract where the terms are in dispute, contract interpretation is a jury issue and this instruction should be used. See Introductory Note to Part D of this Chapter.

2. Instruction 30:30 (disputed term) and Instruction 30:31 (parties' intent) should be given with this instruction, along with any other instructions in this chapter that are appropriate for the case.

### Source and Authority

1. This instruction is supported by **Federal Deposit Insurance Corp. v. Fisher**, 2013 COA 5, ¶ 11, 292 P.3d 934; **Allstate Insurance Co. v. Huizar**, 52 P.3d 816, 819 (Colo. 2002) (“[T]he meaning of a contract must be determined by examination of the entire instrument, and not by viewing clauses or phrases in isolation.”); and **Randall & Blake, Inc. v. Metro Wastewater Reclamation District**, 77 P.3d 804, 806 (Colo. App. 2003) (“[D]ocuments executed together as part of a single transaction should be considered together in ascertaining the intent of the parties.”).

2. Covenants and other recorded instruments, like contracts, should be construed as a whole “seeking to harmonize and give effect to all provisions so that none will be rendered meaningless.” **Pulte Home Corp. v. Countryside Cmty. Ass’n, Inc.**, 2016 CO 64, ¶ 23, 382 P.3d 821, 826.

## 30:33 CONTRACT INTERPRETATION—ORDINARY MEANING

**Words or phrases not defined in a contract should be given their plain, ordinary, and generally accepted meaning.**

### Notes on Use

1. When the court has determined the contract term is ambiguous or there is an oral contract where the terms are in dispute, contract interpretation is a jury issue and this instruction should be used. *See* Introductory Note to Part D of this Chapter.

2. Instruction 30:30 (disputed term) and Instruction 30:31 (parties' intent) should be given with this instruction, along with any other instructions in this Chapter that are appropriate for the case.

### Source and Authority

1. This instruction is supported by **Columbus Investments v. Lewis**, 48 P.3d 1222 (Colo. 2002); **Allstate Insurance Co. v. Huizar**, 52 P.3d 816 (Colo. 2002) (interpretation of insurance contracts); **Copper Mountain, Inc. v. Industrial Systems, Inc.**, 208 P.3d 692 (Colo. 2009); and **Smith v. State Farm Mutual Automobile Insurance Co.**, 2017 COA 6, ¶ 21, 399 P.3d 771, 776 ("The plain meaning therefore does not support limiting the policy definition to vehicles 'primarily' designed for driving on streets or highways.").

2. Dictionary definitions may be consulted to determine plain, ordinary, and generally accepted meaning of words used in contracts. **Owners Ins. Co. v. Dakota Station II Condo. Ass'n**, 2019 CO 65, ¶ 39, 443 P.3d 47 (consulting dictionary to determine ordinary meaning of "impartial" and "advocate"); **Renfandt v. N.Y. Life Ins. Co.**, 2018 CO 49, ¶ 18, 419 P.3d 576, 580 ("When determining the plain and ordinary meaning of words, we may consider definitions in a recognized dictionary.").

### 30:34 CONTRACT INTERPRETATION—USE OF TECHNICAL WORDS IN A CONTRACT

When a contract uses words or phrases from a trade or technical field, those words or phrases should be given their usual meaning in that trade or technical field.

#### Notes on Use

1. When the court has determined the contract term is ambiguous or used in a special or technical sense, contract interpretation is a jury issue and this instruction should be used. *See* Introductory Note to Part D of this Chapter.

2. Instruction 30:30 (disputed term) and Instruction 30:31 (parties' intent) should be given with this instruction, along with any other instructions in this Chapter that are appropriate for the case.

#### Source and Authority

1. This instruction is supported by **Washington County Board of Equalization v. Petron Development Co.**, 109 P.3d 146 (Colo. 2005); **KN Energy, Inc. v. Great Western Sugar Co.**, 698 P.2d 769 (Colo. 1985) (a trial court may not look beyond the plain words of a contract to interpret the parties' underlying intent unless the contract terms are ambiguous or used in a special or technical sense not defined by in the contract); **Town of Silverton v. Phoenix Heat Source System, Inc.**, 948 P.2d 9 (Colo. App. 1997); and RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981).

2. When parties are engaged in a trade or technical field, “[u]nless a different intention is manifested . . . technical terms and words of art are given their technical meaning when used in a transaction within their technical field.” RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(b) (1981); *see* **Bledsoe Land Co. LLLP v. Forest Oil Corp.**, 277 P.3d 838 (Colo. App. 2011); David E. Pierce, *Defining the Role of Industry Custom and Usage in Oil & Gas Litigation*, 57 SMU L. REV. 387, 402 (2004).

3. Technical meanings refer to terms with a unique definition within a specific industry, or to legal terms of art. *See, e.g.*, **Petron Dev. Co.**, 109 P.3d at 153 (“wellhead” has technical meaning in oil and gas industry); **Armentrout v. FMC Corp.**, 842 P.2d 175 (Colo. 1992) (“defective” has technical meaning in product liability cases); **People v. Macrander**, 828 P.2d 234 (Colo. 1992) (“attorney of record” is a legal term of art), *overruled on other grounds by* **People v. Novotny**, 2014 CO 18, ¶ 2, 320 P.3d 1194; **DISH Network Corp. v. Altomari**, 224 P.3d 362 (Colo. App. 2009) (nothing in the record or the statute sug-

gests that “management personnel” has a technical meaning as a word of art in its field that may conflict with its common usage).

4. A technical term with a generally accepted meaning may be redefined for purposes of a particular contract by mutual assent of the parties. **W. Stone & Metal Corp v. DIG HP1 LLC**, 2020 COA 58, ¶ 9 (“[P]arties to a contract may agree to redefine [terms] for disputes arising under their agreement.”).

## 30:35 CONTRACT INTERPRETATION— CONSTRUCTION AGAINST DRAFTER

Any dispute over the meaning of any unclear terms must be decided against the party who prepared the contract if the other party had no opportunity to select the words written in the contract.

### Notes on Use

1. When the court has determined the contract term is ambiguous or there is an oral contract where the terms are in dispute, contract interpretation is a jury issue and this instruction should be used. *See* Introductory Note to Part D of this Chapter.

2. Instruction 30:30 (disputed term) and Instruction 30:31 (parties' intent) should be given with this instruction, along with any other instructions in this Chapter that are appropriate for the case.

3. This instruction should not be given unless it appears other rules of interpretation about which the jury is instructed are likely to be unavailing. **Patterson v. Gage**, 11 Colo. 50, 16 P. 560 (1888).

### Source and Authority

This instruction is supported by **Christmas v. Cooley**, 158 Colo. 297, 406 P.2d 333 (1965). *See also* **Compass Ins. Co. v. City of Littleton**, 984 P.2d 606 (Colo. 1999); **Elliott v. Joyce**, 889 P.2d 43 (Colo. 1994); **U.S. Fid. & Guar. Co. v. Budget Rent-A-Car Sys., Inc.**, 842 P.2d 208 (Colo. 1992); **Am. Family Mut. Ins. Co. v. Johnson**, 816 P.2d 952 (Colo. 1991); **Kuta v. Joint Dist. No. 50(J)**, 799 P.2d 379 (Colo. 1990); **Converse v. Zinke**, 635 P.2d 882 (Colo. 1981); **Grossman v. Sherman**, 198 Colo. 359, 599 P.2d 909 (1979); **Sherman Agency v. Carey**, 195 Colo. 277, 577 P.2d 759 (1978); **Sunshine v. M.R. Mansfield Realty, Inc.**, 195 Colo. 95, 575 P.2d 847 (1978); **Perl-Mack Enters. Co. v. City & County of Denver**, 194 Colo. 4, 568 P.2d 468 (1977); **Gardner v. City of Englewood**, 131 Colo. 210, 282 P.2d 1084 (1955); **D.C. Concrete Mgmt., Inc. v. Mid-Century Ins. Co.**, 39 P.3d 1205 (Colo. App. 2001); **Valdez v. Cantor**, 994 P.2d 483 (Colo. App. 1999); **State Farm Mut. Auto. Ins. Co. v. Bencomo**, 873 P.2d 47 (Colo. App. 1994); **Bassett v. Eagle Telecomms., Inc.**, 708 P.2d 812 (Colo. App. 1985) (this instruction correctly states the law; proper to give the instruction when necessary to resolve a fact question and it is supported by sufficient evidence).

## 30:36 CONTRACT INTERPRETATION—SPECIFIC AND GENERAL CLAUSES

Where there is an inconsistency between general and specific provisions in a contract, the specific provisions express more exactly what the parties intended.

### Notes on Use

1. When the court has determined the contract term is ambiguous or there is an oral contract where the terms are in dispute, contract interpretation is a jury issue and this instruction should be used. See Introductory Note to Part D of this Chapter.

2. Instruction 30:30 (disputed term) and Instruction 30:31 (parties' intent) should be given with this instruction, along with any other instructions in this Chapter that are appropriate for the case.

### Source and Authority

This instruction is supported by **Denver Joint Stock Land Bank v. Markham**, 106 Colo. 509, 107 P.2d 313 (1940); and **Holland v. Board of County Commissioners**, 883 P.2d 500 (Colo. App. 1994).

## E. DAMAGES

### Introductory Note

1. Generally the measure of damages is a question of fact for the jury, and once the fact of damages has been proved, uncertainty as to amount will not bar recovery if there is a reasonable basis for computation. **Tull v. Gundersons, Inc.**, 709 P.2d 940 (Colo. 1985) (once the fact of damage has been proved, uncertainty as to the amount will not bar recovery, and the burden of proof of the fact of damage is by a preponderance of the evidence); **Colo. Nat'l Bank v. Ashcraft**, 83 Colo. 136, 263 P. 23 (1927); **Westesen v. Olathe State Bank**, 75 Colo. 340, 225 P. 837 (1924); **Richner v. Plateau Live Stock Co.**, 44 Colo. 302, 98 P. 178 (1908); **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003); **Roberts v. Adams**, 47 P.3d 690 (Colo. App. 2001) (for damages to be recoverable, the evidence must provide a reasonable basis for their computation); **Wilson & Co. v. Walsenburg Sand & Gravel Co., Inc.**, 779 P.2d 1386 (Colo. App. 1989); **Overland Dev. Co. v. Marston Slopes Dev. Co.**, 773 P.2d 1112 (Colo. App. 1989) (to be recoverable, losses must have been caused by the breach); **Bennett v. Price**, 692 P.2d 1138 (Colo. App. 1984) (prices at which similar residential property is listed on the market is insufficient evidence to establish market value); **Tighe v. Kenyon**, 681 P.2d 547 (Colo. App. 1984).

2. Future damages may be awarded if there exists sufficient evidence to provide a reasonable basis for computation. **Pomeranz v. McDonald's Corp.**, 843 P.2d 1378 (Colo. 1993) (in breach of contract action involving future damages, rule of certainty requires that plaintiff prove that damages will in fact accrue in the future and provide sufficient admissible evidence to enable trier of fact to compute a fair approximation of loss); **Interbank Invs. L.L.C. v. Vail Valley Consol. Water Dist.**, 12 P.3d 1224 (Colo. App. 2000); *see also* **Riggs v. McMurtry**, 157 Colo. 33, 400 P.2d 916 (1965) (evidence must provide reasonable basis for computation of damages); **McDonald's Corp. v. Brentwood Ctr., Ltd.**, 942 P.2d 1308 (Colo. App. 1997) (lost profits may not be awarded if they are speculative, remote, imaginary, or impossible to ascertain).

3. If future damages cannot be proven with a reasonable certainty, the jury may award a measure of damages that would place the injured party in the same position had the contract never been made, limited by the contract price. **HMO Sys., Inc. v. Choicecare Health Servs., Inc.**, 665 P.2d 635 (Colo. App. 1983). A jury may not award both types of damages if the result

would be to put the injured person in a better position than the injured person would have been in had the contract been performed. RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981) (“As an alternative to the measure of damages stated in section 347, the injured party has the right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.”).

4. Where the jury awards damages for a breach, any set-offs for amounts received from other parties should first be deducted before any adjustments are made to enforce contractual limitations on liability. **Taylor Morrison of Colo., Inc. v. Terracon Consultants, Inc.**, 2017 COA 64, ¶¶ 31–35, 410 P.3d 767.

5. As to when a plaintiff may be entitled to recover interest on damages for breach of contract, and at what rate, see generally sections 5-12-102 and 5-12-103, C.R.S. To be entitled to interest, the damages on which interest may be calculated need not necessarily be liquidated. See § 5-12-102(1)(a), (3); **Jasken v. Sheehy Constr. Co.**, 642 P.2d 58 (Colo. App. 1982) (construing and applying section 5-12-102(1)(a)); see also **Ferrellgas, Inc. v. Yeiser**, 247 P.3d 1022 (Colo. 2011) (analyzing setoff and interest calculation under section 5-12-102); **Ballow v. PHICO Ins. Co.**, 878 P.2d 672, 684 (Colo. 1994) (“Section 5-12-102(1)(b) is to be liberally construed to permit recovery of prejudgment interest on money or property wrongfully withheld.”); **Safeco Ins. Co. v. Westport Ins. Corp.**, 214 P.3d 1078 (Colo. App. 2009) (section 5-12-102(1) applies to equitable claim for contribution by insurer against other carriers that had wrongfully withheld their fair share of total due to insured); **Kennedy v. Gillam Dev. Corp.**, 80 P.3d 927 (Colo. App. 2003) (buyers who succeeded on claim to rescind contract to purchase home were entitled to recover prejudgment interest and sellers were entitled to offset value of buyers’ use of property); **Logixx Automation, Inc. v. Lawrence Michels Family Trust**, 56 P.3d 1224 (Colo. App. 2002) (interest calculation begins at time breach of contract occurs rather than at time damages accrue).

6. Under section 5-12-102(1)(a) and (b), unless there is an agreement as to the rate of interest, the statutory rate of interest applies to prejudgment interest on damages recovered for money or property wrongfully withheld, in the absence of proof under section 5-12-102(1)(a) that a greater gain or benefit was realized by the person withholding the money or property. See **Goodyear**

**Tire & Rubber Co. v. Holmes**, 193 P.3d 821 (Colo. 2008) (in strict liability case, interest due from time homeowner replaced defective heating system); **Mesa Sand & Gravel Co. v. Landfill, Inc.**, 776 P.2d 362 (Colo. 1989) (also interpreting statutory phrase “wrongfully withheld”); **Harris Grp., Inc. v. Robinson**, 209 P.3d 1188 (Colo. App. 2009) (amount of prejudgment interest on lost profits through the verdict date must be ascertained with reasonable certainty, though difficult where verdict form does not separate past and future losses); **Butler v. Lembeck**, 182 P.3d 1185 (Colo. App. 2007) (analyzing interest on damages awarded tenant in dispute with landlord); **Alfred Brown Co. v. Johnson-Gibbons & Reed W. Paving-Kemper**, 695 P.2d 746 (Colo. App. 1984); **Prospero Assocs. v. Redactron Corp.**, 682 P.2d 1193 (Colo. App. 1983). “Conventional interest as a matter of contract and statutory prejudgment interest on particular kinds of damage awards are to be distinguished from moratory interest. Moratory interest is an element of damage in itself which is allowed as compensation for the detention and use of money . . . [and its allowance] is a matter committed to the sound discretion of [the] court in consideration of the equities of [the] case.” **E.B. Jones Constr. Co. v. City & County of Denver**, 717 P.2d 1009, 1014–15 (Colo. App. 1986). *But see* § 5-12-102(1)(a)–(b) (appearing to authorize moratory interest, so defined, as statutory interest); **Farmers Reservoir & Irr. Co. v. City of Golden**, 113 P.3d 119 (Colo. 2005) (whether attorney fees are classified as “costs” or “damages” for purpose of awarding moratory interest depends on context of case and rests within discretion of trial court); **Great W. Sugar Co. v. KN Energy, Inc.**, 778 P.2d 272 (Colo. App. 1989) (discussing legislative purpose in enacting section 5-12-102(1)(a)).

7. To constitute a “wrongful withholding” of money or property under section 5-12-102, the withholding need not be tortious or in bad faith but rather a failure to pay or deliver property when there is a legal obligation to do so. **Mesa Sand & Gravel Co.**, 776 P.2d at 364 (citing **Cooper v. Peoples Bank & Trust**, 725 P.2d 78 (Colo. App. 1986)); *see also* § 24-91-103, C.R.S. (Colorado’s prompt payment statute, mandating penalty interest rate when a general contractor fails to timely pay a subcontractor); **New Design Constr. Co., Inc. v. Hamon Contractors, Inc.**, 215 P.3d 1172 (Colo. App. 2008).

8. For a comprehensive discussion of the rules relating to the recovery of interest in contract cases, see J. Kent Miller, *Recovery of Interest: Part II—Other than Personal Injury*, 18 COLO. LAW. 1307 (1989).

9. The economic loss rule provides a defense to tort claims

that are based on duties bargained for and existing in a contract. Cases applying the economic loss rule to particular situations are collected in the Introductory Note to Chapter 9.

10. Colorado follows the “American Rule” with respect to the award of attorney fees in actions for breach of contract; that is, “[i]n the absence of a statute, court rule, or private contract to the contrary, attorney fees are not recoverable by a prevailing party. . . .” **Adams v. Farmers Ins. Grp.**, 983 P.2d 797, 801 (Colo. 1999); *accord* **Allstate Ins. Co. v. Huizar**, 52 P.3d 816 (Colo. 2002); **Agritrack, Inc. v. DeJohn Housemoving, Inc.**, 25 P.3d 1187 (Colo. 2001).

11. A claim brought upon a contract provision for equitable adjustment seeks an equitable remedy. **Parker Excavating, Inc. v. City & County of Denver**, 2012 COA 180, ¶ 18, 303 P.3d 1222.

**30:37 DAMAGES—INTRODUCTION**

If you find in favor of the plaintiff, (*name*), on (his) (her) (its) claim of breach of contract, then you must award (him) (her) (it) (general) (special) (liquidated) (nominal) damages.

To award (general) (special) (liquidated) damages, you must find by a preponderance of the evidence that the plaintiff had damages as a result of the breach, and you must determine the amount of those damages.

If you find in favor of the plaintiff, but do not find any (general) (special) (liquidated) damages, you shall award plaintiff nominal damages.

**Notes on Use**

1. Except when the amount of damages is not in dispute, e.g., liquidated damages (see Instruction 30:40), the amount due on a promissory note, etc., the instruction should not state the amount of damages sought. See **Rodrigue v. Hausman**, 33 Colo. App. 305, 519 P.2d 1216 (1974).

2. Instructions for the particular damages involved in the case should be used with this instruction: Instruction 30:38 (general), Instruction 30:39 (special), Instruction 30:40 (liquidated), or Instruction 30:41 (nominal).

3. When supported by sufficient evidence and applicable to the damages being claimed by the plaintiff, Instruction 5:2, dealing with mitigation of damages, should be given with this instruction.

**Source and Authority**

1. This instruction is supported by **Giampapa v. American Family Mutual Insurance Co.**, 64 P.3d 230, 237 n.3 (Colo. 2003) (“‘General damages’ are those that flow naturally from the breach of contract, whereas ‘special’ or ‘consequential damages’ are other foreseeable damages within the reasonable contemplation of the parties at the time the contract was made.”).

2. An aggrieved party is not obligated to mitigate damages by giving up its rights under a contract. **U.S. Welding, Inc. v. Advanced Circuits, Inc.**, 2018 CO 56, ¶ 11, 420 P.3d 278, 281 (“[I]n the absence of impossibility, frustration of purpose, or some other reason not involv-

ing the fault of any party, for which a contract is no longer capable of being fulfilled, the other party is never obligated to accept an offer of an accord.”).

**30:38 DAMAGES—GENERAL**

**“General damages” means the amount required to compensate the plaintiff for losses that are the natural and probable consequence of the defendant’s breach of the contract.**

**Losses that are a “natural” result of a breach are those losses that an ordinary person of common experience would expect to follow from a breach.**

**Losses are “probable” if the losses were reasonably foreseeable when the contract was made and would likely occur if the contract were breached.**

**If general damages have been proved, you shall award:**

*(Insert the types of general damages that have been proved depending on the kind of contract involved.)*

**Notes on Use**

1. See Notes on Use and Source and Authority to Instruction 30:37 (introduction).
2. Instruction 30:37 (introduction) should be used with this instruction, along with instructions for any other particular damages involved in the case: Instruction 30:39 (special), Instruction 30:40 (liquidated), or Instruction 30:41 (nominal).
3. The court has a duty to instruct the jury on the proper measure of damages for the kind of contract at issue. The measures of damages appropriate for several particular kinds of contract breaches are contained in Instructions 30:42 to 30:53.
4. This instruction should be modified where the defendant has counterclaimed and alleged that the plaintiff breached contract promises.
5. If special damages are also alleged and proven the jury also may receive instruction 30:39, so long as awarding both categories of damages does not result in any double recovery. See **General Steel Domestic Sales, LLC v. Hogan & Hartson, LLP**, 230 P.3d 1275 (Colo. App. 2010).

**Source and Authority**

1. This instruction is supported by **Pomeranz v. McDonald’s Corp**,

843 P.2d 1378 (Colo. 1993) (The general measure of damages for breach of contract cases is that sum that places the non-defaulting party in the position the party would have enjoyed had the breach not occurred.). See also **Smith v. Farmers Ins. Exch.**, 9 P.3d 335 (Colo. 2000); **Colo. Nat'l Bank v. Friedman**, 846 P.2d 159 (Colo. 1993); **Core-Mark Midcontinent Inc., v. Sonitrol Corp.**, 2016 COA 22, ¶ 35, 370 P.3d 353 (discussing foreseeability and types of losses that naturally and probably flow from a breach); **Morris v. Belfor USA Group, Inc.**, 201 P.3d 1253 (Colo. App. 2008); **Clough v. Williams Prod. RMT Co.**, 179 P.3d 32 (Colo. App. 2007); **Kaiser v. Market Square Disc. Liquors, Inc.**, 992 P.2d 636 (Colo. App. 1999); **Husband v. Colo. Mtn. Cellars, Inc.**, 867 P.2d 57 (Colo. App. 1993); **Colo. Interstate Gas Co., Inc. v. Chemco, Inc.**, 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993); **Mesa Sand & Gravel Co. v. Landfill, Inc.**, 759 P.2d 757 (Colo. App. 1988), *rev'd on other grounds*, 776 P.2d 362 (Colo. 1989); **Total Condo. Mgmt., Inc. v. Lester J. Lambert & Co.**, 716 P.2d 146 (Colo. App. 1985); **Smith v. Hoyer**, 697 P.2d 761, 765 (Colo. App. 1984).

2. Recovery of damages is limited by the requirement of probability—the loss must have been a foreseeable consequence of the breach at the time the contract was made. **Core-Mark Midcontinent**, 2016 COA 22, ¶ 52 (a plaintiff must prove that that the loss was a probable—more likely than not—result of the breach).

**30:39 DAMAGES—SPECIAL**

**“Special damages” means damages, other than general damages, that the defendant knew or should have known when the contract was made probably would be incurred by the plaintiff if the defendant breached the contract.**

**If special damages have been proved, you shall award:**

*(Insert the types of special damages that have been proved depending on the kind of contract involved.)*

**Notes on Use**

1. See the Notes on Use to Instruction 30:37 (introduction).
2. Instruction 30:37 (introduction) should be used with this instruction, along with instructions for any other particular damages involved in the case: Instruction 30:38 (general), Instruction 30:40 (liquidated), or Instruction 30:41 (nominal).
3. Special damages must be pled with particularity. C.R.C.P. 9(g).
4. This instruction should be modified where the defendant has counterclaimed and alleged that plaintiff breached contract promises.
5. If general damages are claimed the jury also may receive Instruction 30:38, so long as awarding both categories of damages does not result in any double recovery. *See General Steel Domestic Sales, LLC v. Hogan & Hartson, LLP*, 230 P.3d 1275 (Colo. App. 2010).
6. If lost profits are claimed, the jury should be instructed that they may be awarded only if: they are established with reasonable certainty; the term “net profits” is defined; and a list of the factors the jury should consider in determining any loss of “net profits” is provided. *See Lee v. Durango Music*, 144 Colo. 270, 355 P.2d 1083 (1960) (gross profits alone are not sufficient evidence and proof of business loss must also include expenses); *Carder, Inc. v. Cash*, 97 P.3d 174 (Colo. App. 2003) (to establish net profits, expenses of business must be shown).

**Source and Authority**

1. This instruction is supported by **Denny Construction, Inc. v. City & County of Denver**, 199 P.3d 742, 751 (Colo. 2009) (The foreseeability “requirement is objective, focusing on whether at the time the parties entered into the contract the defendant knew or should have

known that these lost profit damages would probably be incurred by the plaintiff if the defendant breached the contract.”); and **Giampapa v. Am. Family Mut. Ins. Co.**, 64 P.3d 230, 237 n.3 (Colo. 2003) (“‘General damages’ are those that flow naturally from the breach of contract, whereas ‘special’ or ‘consequential damages’ are other foreseeable damages within the reasonable contemplation of the parties at the time the contract was made.”); **Core-Mark Midcontinent Inc. v. Sonitrol Corp.**, 2016 COA 22, ¶ 32, 370 P.3d 353 (“the nonbreaching party may also recover damages for loss that was ‘such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it’” (quoting **Hadley v. Baxendale**, (1854) 156 Eng. Rep. 145, 151)).

2. For special damages to be recoverable, they must have been within the reasonable contemplation of the parties. **Uinta Oil Ref. Co. v. Ledford**, 125 Colo. 429, 244 P.2d 881 (1952); **W. Union Tel. Co. v. Trinidad Bean & Elevator Co.**, 84 Colo. 93, 267 P. 1068 (1928) (citing earlier cases); *see also* **Gen. Steel Domestic Sales, LLC**, 230 P.3d at 1285 (contract damages are limited to those arising from risks considered and bargained for by parties); **Fountain v. Mojo**, 687 P.2d 496 (Colo. App. 1984); RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).

3. Loss of future profits (as distinct from profits already lost) may be recovered in a breach of contract action where they are established with reasonable certainty. **Denny Constr.**, 199 P.3d at 751 (“lost profits due to impaired bonding capacity, like all claims for lost profits, must be established with reasonable certainty”); **Acoustic Mktg. Research, Inc. v. Technics, LLC** 198 P.3d 96, 97 (Colo. 2008) (“future damages, including lost future royalties, may be awarded in a breach of contract action if they are demonstrated with reasonable certainty”); **Belfor USA Grp., Inc. v. Rocky Mtn. Caulking & Waterproofing, LLC**, 159 P.3d 672 (Colo. App. 2006); *see also* **Colo. Nat’l Bank of Denver v. Friedman**, 846 P.2d 159 (Colo. 1993); **Lee**, 144 Colo. at 278, 355 P.2d at 1087; **Nevin v. Bates**, 141 Colo. 255, 347 P.2d 776 (1959) (lost profits claimed for breach of a lease denied as being too speculative); **Uinta Oil Ref. Co.**, 125 Colo. at 434, 244 P.2d at 884–85 (where existence of loss is established, plaintiff can recover loss of net profits even though the exact amount may be difficult to ascertain); **Carlson v. Bain**, 116 Colo. 526, 182 P.2d 909 (1947) (lost profits allowed when rancher did not get possession of ranch property and was unable to raise crops and livestock on the property); **Colo. Nat’l Bank v. Ashcraft**, 83 Colo. 136, 263 P. 23 (1927) (the court did not err in giving an instruction that allowed jury to consider lost profits in assessing damages, and the fact that the amount could not be determined with exact certainty was not a valid basis for denial); **Boyle v. Bay**, 81 Colo. 125, 254 P. 156 (1927) (loss of net profits recoverable if, because of circumstances at time contract entered into, the loss is reasonably within the contemplation of the parties); **Corcoran v. Sanner**, 854 P.2d 1376 (Colo. App. 1993); **Denver Publ’g Co. v. Kirk**, 729 P.2d 1004 (Colo. App. 1986) (where contract terminable at will upon notice being given within certain time, lost profits are recoverable upon termination, but only for

the period of time for which notice should have been given but was not); **L.U. Cattle Co. v. Wilson**, 714 P.2d 1344, 1348 (Colo. App. 1986) (lost profits recoverable “if they are reasonably ascertainable based on past experience and not too speculative, remote, or contingent”); **Fagerberg v. Webb**, 678 P.2d 544, 548 (Colo. App. 1983) (“Once the fact of damage has been proven, uncertainty as to amount will not prevent recovery.”), *rev’d on other grounds sub nom. Webb v. Dessert Seed Co., Inc.*, 718 P.2d 1057 (Colo. 1986); **Stone v. Caroselli**, 653 P.2d 754 (Colo. App. 1982) (lost profits sufficiently foreseeable to be recovered by manufacturer where distributors breached contract to promote the product and expand the market and difficulty in ascertaining exact amount of those damages does not preclude their recovery).

4. Whether lost profits were reasonably foreseeable at the time the contract was made is measured by an objective standard. **Denny Constr.**, 199 P.3d at 743 (“the question is . . . whether [the defendant] knew or should have known that such loss would probably occur”); **H.M.O. Sys., Inc. v. Choicecare Health Servs., Inc.**, 665 P.2d 635 (Colo. App. 1983); *see also* **Lawry v. Palm**, 192 P.3d 550 (Colo. App. 2008). If the fact of future losses is a certainty, the amount of the damages may be a reasonable approximation. **Denny Constr.**, 199 P.3d at 746 (lost profit damages attributable to impaired bonding capacity for construction company not speculative as a matter of law); **Acoustic Mktg. Research, Inc.**, 198 P.3d at 99 (loss of future royalties proved with reasonable certainty); **Logixx Automation, Inc. v. Lawrence Michels Family Trust**, 56 P.3d 1224 (Colo. App. 2002) (evidence supported jury’s determination of damages for lost profits); **Rocky Mtn. Rhino Lining, Inc. v. Rhino Linings USA, Inc.**, 37 P.3d 458 (Colo. App. 2001) (trial court’s calculation of damages for lost profits was reasonable and supported by evidence), *rev’d on other grounds*, 62 P.3d 142 (Colo. 2003); **Wojtowicz v. Greeley Anesthesia Servs., P.C.**, 961 P.2d 520 (Colo. App. 1997) (damages for lost profits are measured by loss of net profits). However, “[t]he absence of prior profits in a newly established business does not create a ‘per se’ exclusion of loss of profit as an item of damage if sufficient competent evidence is proffered.” **Int’l Tech. Instruments, Inc. v. Eng’g Measurements Co.**, 678 P.2d 558, 563 (Colo. App. 1983); *see also* **Terrones v. Tapia**, 967 P.2d 216 (Colo. App. 1998) (summary judgment precluding plaintiff from recovering damages for lost profits proper where evidence offered by plaintiff to establish these damages was speculative); **Wilson & Co. v. Walsenburg Sand & Gravel Co.**, 779 P.2d 1386, 1388 (Colo. App. 1989) (where the evidence of lost profits was insufficient, any such damages would therefore be “speculative and, thus, unrecoverable”).

5. In computing damages for lost profits, the factfinder should consider both discount and inflation rates if competent evidence of these rates is presented. **McDonald’s Corp. v. Brentwood Ctr., Ltd.**, 942 P.2d 1308 (Colo. App. 1997).

6. For cases involving the sale of goods, see sections 4-2-715 and 4-2-719, C.R.S. *See also* **Int’l Tech. Instruments, Inc.**, 678 P.2d at

563.

# DAMAGES—LIQUIDATED

If you find in favor of the plaintiff, (name), and if you also find the parties agreed on an amount to be paid to the plaintiff in the event of a breach by the defendant, (name), then you shall award the agreed amount as the plaintiff's damages.

1. See Notes on Use to Instruction 30:37 (introduction).

2. Instruction 30:37 (introduction) should be used with this instruction.

3. This instruction should not be given if the court has determined that the contractual provision is an improper penalty rather than a provision for liquidated damages.

4. If, in addition to the kind of breach for which the defendant has agreed to pay liquidated damages, the defendant has committed any other breach not covered by a liquidated damages clause, the plaintiff may also be entitled to recover general damages sustained as a result of such breach. See Instruction 30:37.

## Source and Authority

1. This instruction is supported by *Pavine v. Jarvis*, 185 Colo. 303, 512 P.2d 106 (1974) and *Wix v. Powell*, 60 Colo. 482, 117 P. 844 (1921). See also *Powder Horn Construction, Inc. v. City of Florence*, 754 P.2d 858 (Colo. 1988) (lack of mutual intent to liquidate damages); *Robauer v. Little*, 730 P.2d 403 (Colo. 1987); *Offshore Corp. v. Dever*, 754 P.2d 858 (Colo. 1988); *Mid. v. Marcor Housing Sys., Inc.*, 187 Colo. 680, 595 P.2d 1000 (1979); *Grooms v. Rice*, 183 Colo. 334, 499 P.2d 498 (1973); *Yerton v. Howden*, 722 P.2d 786 (Colo. App. 1986); *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 702 P.2d 768 (Colo. App. 1985); *Smith v. Joyce's Submarine Sandwiches, Inc.*, 751 P.2d 651 (Colo. App. 1987); *Kirkland v. Allen*, 678 P.2d 668 (Colo. App. 1984) (liquidated damages clause held to be an unenforceable penalty); *W.M. O'Gara, Inc. v. Cholesterol Health Service, Inc.*, 665 P.2d 685 (Colo. App. 1983) (same); *H. & M. Vending Co. v. Hall*, 702 P.2d 786 (Colo. App. 1985); *W. v. Grosse-Rhode*, 85 Colo. App. 45, 328 P.2d 944 (1958).

2. Liquidated damages provisions must be a reasonable estimate of presumed actual damages. *Kilmer v. Adams City Sch. Dist.*, No. 50, 180 Colo. 35, 1027, 1034 (Colo. 2006) (liquidated damages provision is valid and enforceable if three elements are met: "the parties intended to liquidate damages"; (2) "the amount of liquidated damages, when viewed as of the time the contract is made, was a reasonable estimate of

## 30:40 DAMAGES—LIQUIDATED

If you find in favor of the plaintiff, (*name*), and if you also find the parties agreed on an amount to be paid to the plaintiff in the event of a breach by the defendant, (*name*), then you shall award the agreed amount as the plaintiff's damages.

### Notes on Use

1. See Notes on Use to Instruction 30:37 (introduction).
2. Instruction 30:37 (introduction) should be used with this instruction.
3. This instruction should not be given if the court has determined that the contractual provision is an improper penalty rather than a provision for liquidated damages.
4. If, in addition to the kind of breach for which the defendant has agreed to pay liquidated damages, the defendant has committed another breach not covered by a liquidated damages clause, the plaintiff may also be entitled to recover general damages sustained as a result of such breach. *See* Instruction 30:37.

### Source and Authority

1. This instruction is supported by **Perino v. Jarvis**, 135 Colo. 393, 312 P.2d 108 (1957); and **Bilz v. Powell**, 50 Colo. 482, 117 P. 344 (1911). *See also* **Powder Horn Constructors, Inc. v. City of Florence**, 754 P.2d 356 (Colo. 1988) (lack of mutual intent to liquidate damages); **Rohauer v. Little**, 736 P.2d 403 (Colo. 1987); **O'Hara Grp. Denver, Ltd. v. Marcor Housing Sys., Inc.**, 197 Colo. 530, 595 P.2d 679 (1979); **Grooms v. Rice**, 163 Colo. 234, 429 P.2d 298 (1967); **Yerton v. Bowden**, 762 P.2d 786 (Colo. App. 1988); **Mgmt. Recruiters of Boulder, Inc. v. Miller**, 762 P.2d 763 (Colo. App. 1988); **Emrich v. Joyce's Submarine Sandwiches, Inc.**, 751 P.2d 651 (Colo. App. 1987); **Kirkland v. Allen**, 678 P.2d 568 (Colo. App. 1984) (liquidated damages clause held to be an unenforceable penalty); **H.M.O. Sys., Inc. v. Choicecare Health Servs., Inc.**, 665 P.2d 635 (Colo. App. 1983) (same); **P & M Vending Co. v. Half Shell of Boston, Inc.**, 41 Colo. App. 78, 579 P.2d 93 (1978); **Oldis v. N.W. Grosse-Rhode**, 35 Colo. App. 46, 528 P.2d 944 (1974).

2. Liquidated damages provisions must be a reasonable estimate of presumed actual damages. **Klinger v. Adams Cty. Sch. Dist. No. 50**, 130 P.3d 1027, 1034 (Colo. 2006) (a liquidated damages provision is valid and enforceable if three elements are met: (1) "the parties intended to liquidate damages"; (2) "the amount of liquidated damages, when viewed as of the time the contract is made, was a reasonable estimate of

the *presumed actual damages* that the breach would cause”; and (3) “when viewed again as of the date of the contract, it was difficult to ascertain the amount of *actual damages* that would result from a breach”).

3. The party contending that a damages clause is an improper penalty carries the burden of proving that contention. **Jobe v. Writer Corp.**, 34 Colo. App. 240, 242, 526 P.2d 151, 152 (1974) (“[u]nless it patently appears from the contract itself that the liquidated damages agreed upon are out of proportion to any possible loss . . . the party asserting that the damages clause constitutes a penalty has the burden of proving that contention”); *see also* **Rohauer**, 736 P.2d at 410; **Yerton**, 762 P.2d at 788 (if a single amount is stipulated for several possible breaches, the provision is invalid as a penalty if it is unreasonably disproportionate to the expected loss of the specific breach being sued for); **Wojtowicz v. Greeley Anesthesia Servs., P.C.**, 961 P.2d 520 (Colo. App. 1997) (liquidated damages provision so disproportionate to actual damages as to constitute an unenforceable penalty as a matter of law). In some cases, there may be an issue of law as to whether a contract provision is a liquidated damages provision subject to the rule that such provisions must be reasonable. *See* **Planned Pethood Plus, Inc. v. KeyCorp, Inc.**, 228 P.3d 262 (Colo. App. 2010) (prepayment penalty in promissory note is not liquidated damages clause).

4. The mere presence of an option to seek either liquidated damages or actual damages does not render the liquidated damages clause invalid as a matter of law. **Ravenstar LLC v. One Ski Hill Place LLC**, 2017 CO 83, ¶ 15, 401 P.3d 552. But the option must be exclusive. If a non-breaching party elects to pursue liquidated damages as allowed by the contract, the non-breaching party may not also seek actual damages. “Otherwise, an election to pursue liquidated damages would function as an invalid penalty.” *Id.* at ¶ 16.

5. The party attempting to avoid a liquidated damage provision of a contract has the burden of proving that the provision is an unenforceable penalty. **Bd. of Cty. Comm’rs v. City & County of Denver**, 40 P.3d 25 (Colo. App. 2001). A liquidated damage provision is valid and enforceable if (1) at the time the contract was entered into, anticipated damages in case of a breach were difficult to ascertain, (2) the parties mutually agreed to liquidate damages in advance, and (3) the amount of the liquidated damages, when viewed at the time the contract was made, was a reasonable estimate of the potential general damages that a breach would cause. *Id.*; *see also* **Klinger**, 130 P.3d at 1034 (listing factors used to determine whether a liquidated damages provision constitutes a penalty).

6. For sales contracts governed by the Uniform Commercial Code, the determination of whether a provision is a penalty or a valid liquidated damages clause should be made on the basis of the criteria set out in section 4-2-718, C.R.S. For other contracts, in determining whether a liquidated damages clause is valid, the court should consider

whether a) the amount stipulated was at the time a reasonable estimate of any damages which might result from a breach; b) the anticipated damages in the event of a breach would have been uncertain or difficult to prove; and c) the parties intended to liquidate damages in advance. **Butler v. Lembeck**, 182 P.3d 1185 (Colo. App. 2007).

7. “[A] liquidated damages clause addressing delay in a performance contract will not be enforced where such delay is due in whole or in part to the fault of the party claiming the clause’s benefit.” **Medema Homes, Inc. v. Lynn**, 647 P.2d 664, 667 (Colo. 1982); *accord* **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003).

8. A non-competition provision in an employment contract with a physician that provides for liquidated damages in the event of a breach is governed by section 8-2-113(3), C.R.S. *See, e.g., Wojtowicz*, 961 P.2d 521-22.

9. As to a plaintiff’s right to recover interest on liquidated damages for breach of contract, see the introductory note to this Chapter and **Board of County Commissioners**, 40 P.3d at 35.

## 30:41 DAMAGES—NOMINAL

If you find in favor of the plaintiff, but do not award any general, special, or liquidated damages, you shall award the plaintiff nominal damages in the sum of one dollar.

### Notes on Use

1. See the Notes on Use to Instruction 30:37 (introduction).
2. Instruction 30:37 (introduction) should be used with this instruction, along with instructions for any other particular damages involved in the case: Instruction 30:38 (general), Instruction 30:39 (special), or Instruction 30:40 (liquidated).

### Source and Authority

1. This instruction is supported by **Hoehne Ditch Co. v. John Flood Ditch Co.**, 76 Colo. 500, 233 P. 167 (1925); **Patrick v. Colorado Smelting Co.**, 20 Colo. 268, 38 P. 236 (1894); **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003); and RESTATEMENT (SECOND) OF CONTRACTS § 346(2) (1981). As a matter of law, nominal damages are one dollar. **City of Westminster**, 100 P.3d at 481; **Overland Dev. Co. v. Marston Slopes Dev. Co.**, 773 P.2d 1112 (Colo. App. 1989); **Colo. Inv. Servs., Inc. v. Hager**, 685 P.2d 1371 (Colo. App. 1984) (quoting the language of a former version of this instruction with approval).

2. In the absence of sufficient proof of general damages, the plaintiff is nonetheless entitled to nominal damages. See **Pomeranz v. McDonald's Corp.**, 843 P.2d 1378 (Colo. 1993) (in breach of contract action involving future damages, rule of certainty requires that plaintiff prove that damages will in fact accrue in the future and provide sufficient admissible evidence to enable trier of fact to compute a fair approximation of loss); **Interbank Invs. L.L.C. v. Vail Valley Consol. Water Dist.**, 12 P.3d 1224 (Colo. App. 2000); see also **Riggs v. McMurtry**, 157 Colo. 33, 400 P.2d 916 (1965) (evidence must provide reasonable basis for computation of damages); **McDonald's Corp. v. Brentwood Ctr., Ltd.**, 942 P.2d 1308 (Colo. App. 1997) (lost profits may not be awarded if they are speculative, remote, imaginary, or impossible to ascertain).

## 30:42 DAMAGES—PURCHASER'S FOR BREACH OF LAND PURCHASE CONTRACT

(The amount of damages, if any, is the market value of the property at the time of the breach minus the contract price, plus all payments made by the plaintiff on the contract.)

### Notes on Use

1. When applicable, this instruction should be used as the insertion in Instruction 30:38.
2. If the plaintiff has not claimed to have made any payments on the contract, the last clause relating to such payments should be omitted.
3. When necessary, the definition of market value set out in the second paragraph of Instruction 36:3 may be given with this instruction.

### Source and Authority

This instruction is supported by **Medema Homes, Inc. v. Lynn**, 647 P.2d 664 (Colo. 1982) (citing a former version of this instruction); **Minshall v. Case**, 148 Colo. 12, 364 P.2d 868 (1961); **Kroesen v. Shenandoah Homeowners Ass'n**, 2020 COA 31, ¶ 57, 461 P.3d 672, 682 (“The standard measure of damages for the breach of a contract for the sale of real estate is the difference between the contract price and the fair market value of the property at the time of the breach.”); and **Bennett v. Price**, 692 P.2d 1138 (Colo. App. 1984) (also adopts as the definition of market value the definition set out in the second paragraph of Instruction 36:3).

### 30:43 DAMAGES—SELLER'S FOR BREACH OF LAND PURCHASE CONTRACT

(The amount of damages, if any, is the contract price minus the market value of the property at the time of the breach, minus any payments made by the defendant on the contract.)

#### Notes on Use

1. When applicable, this instruction should be used as the insertion in Instruction 30:38.

2. If there is no dispute that the defendant in fact made no payments on the contract, the clause relating to such payments should be omitted.

3. When necessary, the definition of market value set out in the second paragraph of Instruction 36:3 may be given with this instruction.

#### Source and Authority

This instruction is supported by **Watrous v. Hilliard**, 38 Colo. 255, 88 P. 185 (1906). *See also* **Higbie v. Johnson**, 626 P.2d 1147 (Colo. App. 1980); **Sorenson v. Connelly**, 36 Colo. App. 168, 536 P.2d 328 (1975); **F. Poss Farms, Inc. v. Miller**, 35 Colo. App. 152, 529 P.2d 1343 (1974).

**30:44 DAMAGES—EMPLOYER'S FOR EMPLOYEE'S  
BREACH OF PERSONAL SERVICE  
CONTRACT**

(The amount of damages, if any, is the reasonable cost of comparable services minus the amount the plaintiff originally agreed to pay the defendant.)

**Notes on Use**

When applicable, this instruction should be used as the insertion in Instruction 30:38.

**Source and Authority**

This instruction is supported by **Cannon Coal Co. v. Taggart**, 1 Colo. App. 60, 27 P. 238 (1891).

### 30:45 DAMAGES—BUILDER'S FOR BREACH OF CONSTRUCTION CONTRACT BY OWNER PRIOR TO COMPLETION

(The contract price agreed upon by the parties:

(a) minus any payments made by the defendant on the contract; and

(b) minus what it would have cost the plaintiff if [he] [she] had completed the *[describe the subject matter of the contract]* according to the contract.)

#### Notes on Use

1. When applicable, this instruction should be used as the insertion in Instruction 30:38.

2. If there is no dispute that the defendant has made no payments on the contract, clause (a) should be omitted.

3. If necessary, Instruction 30:47 defining “agreed-upon contract price” should be given with this instruction.

4. Also, if necessary, another instruction stating what factors should be considered in determining the builder's cost of completion should be given.

5. In a few cases, the builder's damages may be the amount of the builder's reasonable expenditures incurred prior to the time of the breach by the owner. In those cases, the instruction should be modified accordingly. Two such situations are when (a) the owner has repudiated the contract or the owner's breach was such as to amount to a repudiation, thereby giving the builder the alternative restitutional remedy of *quantum meruit*, or (b) the plaintiff is unable to prove the cost of completing the contract. See 11 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 60.6 (rev. ed. 2005); McCORMICK, DAMAGES §§ 164–166 (1935).

6. When the builder has fully performed the contract, the builder's measure of damages is the agreed-upon contract price. CORBIN ON CONTRACTS, *supra*, at § 60.6. The measure of damages when the builder has substantially performed is set out in Instruction 30:46.

#### Source and Authority

This instruction is supported by **Gundersons, Inc. v. Tull**, 678 P.2d 1061 (Colo. App. 1983) (in proving lost profits in the form of the

out-of-bargain measure of contract damages, once the fact of damage has been proved, uncertainty as to amount of damages will not bar recovery), *rev'd on other grounds*, 709 P.2d 940 (Colo. 1985); **Bruce Hughes, Inc. v. Ingels & Associates, Inc.**, 653 P.2d 88 (Colo. App. 1982) (citing and approving the giving of this instruction); **Jasken v. Sheehy Construction Co.**, 642 P.2d 58 (Colo. App. 1982) (subcontractor entitled to same measure of damages for wrongful termination by contractor of construction subcontract); and **Comfort Homes, Inc. v. Peterson**, 37 Colo. App. 516, 549 P.2d 1087 (1976) (citing former version of this instruction and applying the rule stated).

**30:46 DAMAGES—BUILDER’S FOR SUBSTANTIAL  
THOUGH NOT COMPLETE  
PERFORMANCE OF CONSTRUCTION  
CONTRACT**

(The contract price agreed to by the parties:

(a) minus any payments made by the defendant,  
and

(b) minus the reasonable cost to the defendant  
of putting the [*describe the subject matter of the contract*]  
in the condition it would have been in had the  
contract been performed according to its terms.)

**Notes on Use**

1. When applicable, this instruction is to be used as the insertion in Instruction 30:38.

2. Normally, in a construction contract, the full or at least substantial performance by the builder is a condition precedent to the builder’s right to recover against the owner on the contract. If the owner, pursuant to C.R.C.P. 9(c), has pleaded the lack of complete performance as the nonperformance of such a condition precedent, then the builder must prove either complete or substantial performance. *See* Note 1 of the Notes on Use to Instruction 30:10 and Instruction 30:11 (defining “substantial performance”). This instruction is applicable to these cases and may be given as worded if there is no dispute as to the fact that the plaintiff, at most, rendered only substantial performance. However, if the plaintiff claims full performance and there is supporting evidence for the plaintiff’s claim, then this instruction should be appropriately modified so that it is clear to the jury that clause (b) applies only if they find the plaintiff rendered substantial performance as opposed to complete or full performance. Also, where clause (b) is applicable, while the burden of proving at least substantial performance is on the plaintiff, the burden of proving the cost of completing performance may in certain circumstances be on the defendant. In these circumstances, an additional instruction on this point should be given to the jury. *See Zambakian v. Leson*, 79 Colo. 350, 246 P. 268 (1926); *Morris v. Hokosona*, 26 Colo. App. 251, 143 P. 826 (1914).

3. Even though the builder may not have rendered substantial performance and, therefore, cannot recover on the express contract, the builder may nonetheless be entitled to recover for the reasonable value of his or her services on the theory of *quantum meruit*, less any damages resulting to the other party because of the builder’s breach. *See*

**Reynolds v. Armstead**, 166 Colo. 372, 443 P.2d 990 (1968); **Denver Ventures, Inc. v. Arlington Lane Corp.**, 754 P.2d 785 (Colo. App. 1988).

4. If there is no dispute that the defendant has made no payments on the contract, clause (a) should be omitted.

5. If the application of clause (b) by the jury would result in unreasonable economic waste, for example, the cost of substituting the specified brand of water pipe for that which the plaintiff did install, that was virtually identical, this instruction must be appropriately modified. See **Campbell v. Koin**, 154 Colo. 425, 391 P.2d 365 (1964).

### Source and Authority

This instruction is supported by **Campbell**, 154 Colo. at 429–30, 391 P.2d at 367 (citing several earlier cases). See also **Houy v. Davis Oil Co.**, 175 Colo. 180, 486 P.2d 18 (1971); **Little Thompson Water Ass'n v. Strawn**, 171 Colo. 295, 466 P.2d 915 (1970) (involving a service contract rather than a construction contract).

**30:47 DEFINITION—CONTRACT PRICE AGREED UPON**

The contract price agreed upon by the parties means the price originally agreed to in the contract, plus or minus adjustments for any later changes agreed to by the parties.

**Notes on Use**

When necessary, this instruction is to be used with such Instructions as 30:48 and 30:49.

**Source and Authority**

This instruction is supported by **Granberry v. Perlmutter**, 147 Colo. 474, 364 P.2d 211 (1961) (by implication); **Hottel v. Poudre Valley Reservoir Co.**, 41 Colo. 370, 92 P. 918 (1907); and **Sisters of Charity v. Burke**, 22 Colo. App. 230, 124 P. 472 (1912).

**30:48 DAMAGES—BUILDER’S FOR OWNER’S  
PARTIAL BREACH—FAILURE TO MAKE  
INSTALLMENT PAYMENT**

**(The amount of any installment payment[s] due  
the plaintiff under the contract.)**

**Notes on Use**

When applicable, this instruction should be used as the insertion in Instruction 30:38.

**Source and Authority**

This instruction is supported by 11 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 60.4 (rev. ed. 2005).

## 30:49 DAMAGES—OWNER'S FOR BREACH OF CONSTRUCTION CONTRACT BY BUILDER

(The reasonable cost to the plaintiff of completing the *[describe the subject matter of the contract]* according to the contract, minus any unpaid balance of the contract price.)

### Notes on Use

1. When applicable, this instruction should be used as the insertion in Instruction 30:38.

2. In addition to the damages covered by this instruction, the plaintiff may also be entitled to recover damages for delay. *See* Instruction 30:50.

3. In cases in which unreasonable economic waste would result if this instruction were given, the following should be substituted: "The market value of the (describe the subject matter of the contract) had the contract been fully performed less the market value of the (describe the subject matter of the contract) as it now exists." *See Gold Rush Invs., Inc. v. G.E. Johnson Constr. Co.*, 807 P.2d 1169 (Colo. App. 1990); *see also Campbell v. Koin*, 154 Colo. 425, 391 P.2d 365 (1964); *Sanford v. Kobey Bros. Constr. Corp.*, 689 P.2d 724 (Colo. App. 1984); *Worthen Bank & Trust Co. v. Silvercool Serv. Co.*, 687 P.2d 464 (Colo. App. 1984). The phrase "as it now exists" may not always be appropriate, and should be modified if necessary, e.g., if the building had been damaged after the plaintiff took control of it from the defendant, or the plaintiff, after taking control, made improvements, thereby increasing its value.

4. "If the defect is remedial, recovery will be based on the [reasonable] cost to repair the defect," even though that cost may significantly exceed the original contract price. *Olson Plumbing & Heating, Inc. v. Douglas Jardine, Inc.*, 626 P.2d 750, 752 (Colo. App. 1981). "Where . . . part of the deficiencies can be repaired [or completed] at reasonable cost and part cannot, the cost of repair [or completion] can be assessed as the measure of damages [as] to the former and the difference in market value can be used as to the latter." *Summit Constr. Co. v. Yeager Garden Acres, Inc.*, 28 Colo. App. 110, 121, 470 P.2d 870, 875 (1970); *see Sanford*, 689 P.2d at 726. In those cases an appropriate instruction combining the principal instruction and the alternate instruction should be given.

5. Where a builder-developer breaches a "promise to construct general amenities located on property not owned by the promisee, commonly referred to as 'off-site' facilities[.]" the proper measure of dam-

ages is “the diminution in value of the property purchased” by the promisee, rather than the cost of completing such off-site work. **Kniffin v. Colo. W. Dev. Co.**, 622 P.2d 586, 591 (Colo. App. 1980); *accord* **Seago v. Fellet**, 676 P.2d 1224 (Colo. App. 1983). In those circumstances, an instruction setting forth this “difference in market value” measure of damages should be given, rather than this instruction. *See, e.g.*, Instruction 6:11, appropriately modified.

### Source and Authority

1. This instruction is supported by **Fleming v. Scott**, 141 Colo. 449, 348 P.2d 701 (1960); **Newcomb v. Schaeffler**, 131 Colo. 56, 279 P.2d 409 (1955); and **McKinley v. Willow Construction Co., Inc.**, 693 P.2d 1023 (Colo. App. 1984).

2. Generally, the measure of damages for breach of a construction contract by the contractor is an amount that would put the owner “in the same position he would have been had the breach not occurred.” **Pomeranz v. McDonald’s Corp.**, 843 P.2d 1378, 1381 (Colo. 1993); *see* **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003) (applying benefit-of-bargain rule).

3. Under section 5-12-102(1)(a) and (3), C.R.S., prejudgment interest may be awarded on damages for breach of a construction contract, as money wrongfully withheld, even though the amount of such damages was unliquidated at the time of the breach. **Hott v. Tillotson-Lewis Constr. Co.**, 682 P.2d 1220 (Colo. App. 1983). Under section 5-12-102(1)(b), where damages for costs to replace a defective heating system are appropriate, interest accrues from the time of the replacement. **Goodyear Tire & Rubber Co. v. Holmes**, 193 P.3d 821 (Colo. 2008) (strict liability case).

## 30:50 DAMAGES—OWNER'S FOR DELAY IN COMPLETION OF CONSTRUCTION CONTRACT

(The reasonable net rental value, that is, the gross rental value of the *[describe the subject matter of the contract]* minus all reasonable expenses that normally would be incurred in connection with the occupancy of the *[describe the subject matter of the contract]* during the period for which the completion was delayed.)

### Notes on Use

1. When applicable, this instruction should be used as the insertion in Instruction 30:38. A delay may result in certain special damages that may also be recoverable. *See, e.g.,* CHARLES T. MCCORMICK, *LAW OF DAMAGES* § 170 (1935); *see also* **Tricon Kent Co. v. Lafarge N. Am., Inc.**, 186 P.3d 155 (Colo. App. 2008) (In a suit by a subcontractor against a general contractor, the “no damages for delay” clause was valid and enforceable, but construed against the general contractor and invalidated on the basis of the general contractor’s affirmative and willful interference with the subcontractor’s performance. In dicta, the court stated that the general rule also applies to contracts with owners.).

2. This instruction is applicable whether or not the owner intended to rent the building upon completion. 11 JOSEPH M. PERILLO, *CORBIN ON CONTRACTS* § 60.4 (rev. ed. 2005).

3. If the damages for delay have been covered by a liquidated damages provision, Instruction 30:40 will normally be the appropriate instruction rather than this instruction.

### Source and Authority

This instruction is supported by **McIntire v. Barnes**, 4 Colo. 285 (1878).

**30:51 DAMAGES—BROKER'S FOR BREACH OF  
REAL ESTATE COMMISSION  
CONTRACT**

**(That percentage of the sales price the defendant agreed to pay the plaintiff as [his] [her] commission.)**

**Notes on Use**

1. When applicable, *see* Instruction 30:56 (listing elements of liability for a real estate commission claim), this instruction should be used as the insertion in Instruction 30:38.

2. This instruction has been drafted for what is believed to be the typical situation, namely, that the defendant did consummate the sale to the purchaser. When that is not the case, this instruction should be appropriately modified. For example, in a case where the plaintiff found a buyer to purchase on the defendant's original terms and then the defendant refused to sell, the following would generally be more appropriate: "that percentage of the selling price the defendant agreed to pay the plaintiff as [his] [her] commission if the property were sold at that or a better price."

3. If the parties agreed to a different measure for the commission, this instruction should be modified accordingly.

**Source and Authority**

This instruction is supported by **Watson v. United Farm Agency, Inc.**, 165 Colo. 439, 439 P.2d 738 (1968) (broker's commission is dependent upon terms of the listing agreement). *See also* Notes on Use and Source and Authority to Instruction 30:56.

**30:52 DAMAGES—OWNER'S FOR WRONGFUL  
DEPRIVATION OF USE OF A CHATTEL**

**(Loss of use may be measured by either lost profits or reasonable rental value.)**

**Notes on Use**

When applicable, this instruction should be used as the insertion in Instruction 30:38.

**Source and Authority**

This instruction is supported by **Koenig v. PurCo Fleet Services, Inc.**, 2012 CO 56, ¶ 16, 285 P.3d 979 (the loss of use damages can be measured by either lost profits or reasonable rental value without proof of probable rental income).

**30:53 DAMAGES—OWNER'S FOR BREACH OF A  
COVENANT AGAINST ENCUMBRANCES**

**(The difference between the fair market value of the property with and without the encumbrance.)**

**Notes on Use**

When applicable, this instruction should be used as the insertion in Instruction 30:38.

**Source and Authority**

This instruction is supported by **Loveland Essential Group, LLC v. Grommon Farms, Inc.**, 251 P.3d 1109 (Colo. App. 2010) (where the encumbrance at issue is a lease, and the lease is not the highest and best use of the property, the measure of damages is the difference between the fair market value of the property with the lease and the fair market value without the lease).

**F. PARTICULAR CONTRACTS****30:54 CLAIM—BUILDING CONTRACTOR'S  
BREACH OF IMPLIED WARRANTY—  
ELEMENTS OF LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of breach of implied warranty, you must find both of the following have been proved by a preponderance of the evidence:

1. (As a business venture, the) (The) defendant (entered into a contract with the plaintiff to build [*insert an appropriate description, e.g., "a house for the plaintiff"*]) ([built] [or] [had built] [*insert an appropriate description, e.g., "a house"*]) which [he] [she] [sold to the plaintiff]); and

2. When the defendant (gave possession of) (sold) the (*insert appropriate description, e.g., "house"*) to the plaintiff, the (*insert appropriate description, e.g., "house"*) did not comply with one or more of the warranties the law implies as part of such a (construction contract) (contract of sale).

If you find that either one or both of these statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that both of these statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense

**has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. Whenever this instruction is given, Instruction 30:55 (building contractor's implied warranties) must also be given or, in lieu of giving that instruction, this instruction may be appropriately modified to describe specifically the implied warranty or warranties the plaintiff claims (and has presented sufficient evidence of) the defendant failed to comply with, e.g., a building set-back requirement set out in the local zoning ordinance.

2. Omit either numbered paragraph, the facts of which are not in dispute, and revise the other portions of the instruction as necessary.

3. Use whichever parenthesized or bracketed words and phrases are most appropriate, and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

4. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

### Source and Authority

1. This instruction is supported by **Carpenter v. Donohoe**, 154 Colo. 78, 388 P.2d 399 (1964), in which the court also held that the warranties applied whether the house was sold while under construction or after it had been completed. *See also* **Mulhern v. Hederich**, 163 Colo. 275, 430 P.2d 469 (1967); **Glisan v. Smolenske**, 153 Colo. 274, 387 P.2d 260 (1963); **Wall v. Foster Petroleum Corp.**, 791 P.2d 1148 (Colo. App. 1989) (allowing rescission and restitution as an alternative remedy for breach of warranty damages).

2. The failure to correct defects caused by hazards of soil, weather, labor, and other like conditions that are the responsibility of the builder is a failure to construct the building in a workmanlike manner. **Newcomb v. Schaeffler**, 131 Colo. 56, 279 P.2d 409 (1955).

3. Privity is an essential element of claims for breach of implied warranties arising from transactions involving real property. **Forest City Stapleton Inc. v. Rogers**, 2017 CO 23, ¶ 7, 393 P.3d 487, 489 ("We hold that, because breach of the implied warranty of suitability is

a contract claim, privity of contract is required to prevail on such a claim.”). The implied warranty of fitness for habitation does not extend to a purchaser against a seller of a house which had previously been occupied. See **H.B. Bolas Enters., Inc. v. Zarlengo**, 156 Colo. 530, 400 P.2d 447 (1965); see also **Gallegos v. Graff**, 32 Colo. App. 213, 215, 508 P.2d 798, 799 (1973) (“implied warranty . . . is available to the buyer of a newly constructed house against the builder-vendor . . . [but] this . . . warranty . . . does not extend to purchasers of a used home from [the original purchasers and occupiers] who were not the builders”); **Utz v. Moss**, 31 Colo. App. 475, 478, 503 P.2d 365, 367 (1972) (where “construction company knows, or should know, that the intended purchaser and first occupant will not be the realty company [having the house built], but rather the initial home owner, the implied warranty . . . extends to that first purchaser”). But see **Duncan v. Schuster-Graham Homes, Inc.**, 194 Colo. 441, 578 P.2d 637 (1978) (implied warranty does run to second buyer where builder repurchased from first buyer, refurbished the home, and resold it as a new home to second buyer).

4. The implied warranty of suitability arises when a commercial developer improves and sells land for the express purpose of residential construction. **Rusch v. Lincoln-Devore Testing Lab., Inc.**, 698 P.2d 832 (Colo. App. 1984). The warranty of suitability has three elements: (1) land is improved and sold for a particular purpose; (2) a vendor has reason to know that the purchaser is relying upon the skill or expertise of the vendor in improving the parcel for that particular purpose; and (3) the purchaser does in fact rely.

5. In actions or proceedings filed on or after April 25, 2003, asserting a “claim, counterclaim, cross-claim, or third party claim for damages or loss to, or the loss of use of, real or personal property or personal injury caused by a defect in the design or construction of an improvement to real property,” see the Construction Defect Action Reform Act, §§ 13-20-801 to -808, C.R.S. § 13-20-802.5(1). In particular, with respect to claims based on breach of warranty, especially those based on express warranty, see section 13-20-807.

6. As an alternative remedy to a contract action for breach of implied warranties under this instruction, a subsequent purchaser may sue on the theory of negligence to recover property damage to the structure caused by the negligence of the home builder. Further, because “Colorado has recognized recovery of damages for negligence without the parties being in privity of contract,” a remote subsequent purchaser, not in privity of contract with the home builder, may maintain such a negligence action. **Weller v. Cosmopolitan Homes, Inc.**, 44 Colo. App. 470, 471, 622 P.2d 577, 578 (1980), *aff’d*, 663 P.2d 1041 (Colo. 1983) (limiting the rule of the case “to latent defects which the purchaser was unable to discover prior to purchase”); see also **Johnson v. Graham**, 679 P.2d 1090 (Colo. App. 1983) (undiscovered failure to install drain or properly compact soil could be considered latent defects), *rev’d in part*

on other grounds *sub nom.* **Tri-Aspen Constr. Co. v. Johnson**, 714 P.2d 484 (Colo. 1986).

7. To be liable as a builder under this instruction the defendant must have been a person regularly engaged in the “business of building” so that the sale is commercial in nature, rather than casual or personal. **Mazurek v. Nielsen**, 42 Colo. App. 386, 599 P.2d 269; *accord* **Erickson v. Oberlohr**, 749 P.2d 996 (Colo. App. 1987). Even though a builder-vendor may have begun construction of a house as a personal residence, if, before completion, he or she puts the house on the market in the capacity of a builder-vendor, a subsequent sale is a “commercial” one to which the implied warranties set out in this instruction attach. **Sloat v. Matheny**, 625 P.2d 1031 (Colo. 1981); *see also* **Davies v. Bradley**, 676 P.2d 1242 (Colo. App. 1983) (fact that purchasers were unaware the seller was also the builder does not preclude purchaser’s claim for breach of warranty).

8. To recover on the theory of breach of the implied warranty of habitability, a purchaser need not first have made an inspection of the property. Moreover, the willful concealment of defects obviates any requirement of inspection, even for obvious defects, because in a case of concealment the purchaser need only have been ignorant of the facts concealed. *Id.*

9. An implied warranty comparable to the warranties covered by this instruction may arise from the sale of land by a commercial developer who improves land and sells it for an express purpose. *See, e.g.,* **Rusch**, 698 P.2d at 835 (recognizing an implied warranty of fitness for a particular purpose).

10. A builder or developer of residential construction must “provide the purchaser with a copy of a summary report of the analysis and the site recommendations” concerning soils and land hazards. § 6-6.5-101(1), C.R.S. In addition to “any other liability or penalty,” the failure to provide such a report renders the developer or builder liable to the purchaser for a \$500.00 civil penalty. § 6-6.5-101(2).

## 30:55 DEFINITION—BUILDING CONTRACTOR'S IMPLIED WARRANTIES

A person who enters into a contract to build a building or structure for another or who, as a business venture, builds or has built a structure or building and sells that structure or building to another impliedly warrants, that is, impliedly promises, that:

1. All relevant provisions of the (*describe any relevant codes*) applicable to the construction of the structure or building have been complied with;
2. All work on the structure or the building has been done in a workmanlike manner; and
3. The building or structure is suitable for the ordinary purposes for which it might reasonably be used.

### Notes on Use

1. Note 1 of the Notes on Use to Instruction 30:54 (listing elements of liability for building contractor's breach of implied warranty claim) is also applicable to this instruction.

2. Omit any numbered subparagraph or other portions of this instruction that are not appropriate to the evidence in the case.

### Source and Authority

1. This instruction is supported by **Carpenter v. Donohoe**, 154 Colo. 78, 388 P.2d 399 (1964).

2. A builder of a new house impliedly warrants the house has been built in a workmanlike manner and that it is fit for habitation. This implied warranty includes a garage "built and sold as an integral part of the purchase of the house." **Roper v. Spring Lake Dev. Co.**, 789 P.2d 483, 486 (Colo. App. 1990) (foul odor in attached garage rendered townhouse unfit for its intended use). The implied warranty that the structure was built in a workmanlike manner includes the workmanlike grading of the surrounding premises when the construction of the structure cannot be divorced from that work and the responsibility for doing that work has been undertaken by the contractor. **Shiffers v. Cunningham Shepherd Builders Co.**, 28 Colo. App. 29, 470 P.2d 593 (1970). The implied warranty of habitability of a house (i.e., "suitable for its intended use") also includes a water supply sufficient in quantity

and quality for its useful occupancy. **Mazurek v. Nielsen**, 42 Colo. App. 386, 599 P.2d 269 (1979). It does not include, “[h]owever, a claim based solely on the lack of a certificate of occupancy . . . [because the] warranty protects against construction defects, not procedural defects.” **Dann v. Perrotti & Hauptman Dev. Co.**, 670 P.2d 448, 451 (Colo. App. 1983). In cases involving these and similar situations, this instruction should be modified according to the particular facts.

3. “These warranties may be limited by an express provision in the contract between the parties. However, such limitation must be accomplished by clear and unambiguous language.” **Belt v. Spencer**, 41 Colo. App. 227, 230, 585 P.2d 922, 925 (1978); *accord* **Sloat v. Matheny**, 625 P.2d 1031 (Colo. 1981) (ambiguous language held insufficient to constitute disclaimer); **Davies v. Bradley**, 676 P.2d 1242 (Colo. App. 1983) (“as is” language may not be sufficient to disclaim an implied warranty).

4. In **Town of Alma v. AZCO Construction, Inc.**, 985 P.2d 56 (Colo. App. 1999), *aff’d on other grounds*, 10 P.3d 1256 (Colo. 2000), the court declined to recognize a claim for breach of implied warranty of sound workmanship on a public works contract.

### 30:56 CLAIM—REAL ESTATE COMMISSION— ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim to recover a real estate commission, you must find all of the following have been proved by a preponderance of the evidence:

1. The plaintiff held a valid license as a real estate broker under the laws of Colorado;

2. The plaintiff, acting as a real estate broker, entered into a listing agreement with the defendant to sell the defendant's property;

3. [*insert the performance or occurrence of any conditions precedent the defendant has denied under C.R.C.P. 9(c)*];

4. The plaintiff produced a purchaser who was ready, willing and able to complete the purchase of the property according to the terms of the listing agreement; and

5. The sale of the property was (completed between the defendant and the purchaser) (prevented by the defendant's refusal or neglect to complete the sale).

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any

one or more of these affirmative defenses have not) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. Use whichever parenthesized phrase in numbered paragraph 5 of the instruction is more appropriate.

2. Omit any numbered paragraphs, the facts of which are not in dispute, and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

3. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

4. When necessary, other appropriate instructions defining such terms as “real estate broker” must also be given with this instruction.

#### Source and Authority

1. This instruction is supported by **Fletcher v. Garrett**, 167 Colo. 60, 445 P.2d 401 (1968) (supports numbered paragraph 4 of the instruction and also holds contract required in numbered paragraph 2 may be implied from the circumstances); **Osborn v. Razatos Realty Co.**, 158 Colo. 446, 407 P.2d 342 (1965) (oral contract of employment as an agent sufficient); **Stavely v. Johnson**, 157 Colo. 56, 400 P.2d 922 (1965) (contract between plaintiff and defendant essential); **Circle T Corp. v. Crocker**, 155 Colo. 263, 393 P.2d 744 (1964) (actual consummation of the sale not a condition to broker’s right to commission); **Garrett v. Richardson**, 149 Colo. 449, 369 P.2d 566 (1962) (“exclusive” listing becomes irrevocable for the period of time agreed upon where broker expends money or renders services in reliance); **Hayutin v. De Andrea**, 139 Colo. 40, 337 P.2d 383 (1959) (not necessary that broker be the sole cause of the sale, but he must be a predominating effective cause and not merely indirect, incidental, or contributing cause); **Carpenter v. Francis**, 136 Colo. 494, 319 P.2d 497 (1957) (states rules of numbered paragraphs 2 and 4); **McCullough v. Thompson**, 133 Colo. 352, 295

P.2d 221 (1956) (consummation of the sale not a condition to broker's right to recover); **Benham v. Heyde**, 122 Colo. 233, 221 P.2d 1078 (1950) (supports the requirement set out in numbered paragraph 1); **Dunton v. Stemme**, 117 Colo. 327, 187 P.2d 593 (1947) (proof of one of the statutory conditions set out in numbered paragraph 5 essential to broker's right to recover commission); **Mapes v. City of Walsenburg**, 151 P.3d 574 (Colo. App. 2006) (broker entitled to commission once qualified buyer produced even though seller refuses to consummate transaction); and **Denver 1500, Inc. v. Wall**, 43 Colo. App. 282, 602 P.2d 903 (1979) (under paragraph 5, a broker who thwarts the closing of a sale is not entitled to a commission on the basis of the claim that the seller refused or neglected to make the sale).

2. "It has long been the law in Colorado that a broker who breaches his fiduciary duty forfeits his right to a commission." **T-A-L-L, Inc. v. Moore & Co.**, 765 P.2d 1039, 1041 (Colo. App. 1988), *aff'd in part, rev'd in part on other grounds*, 792 P.2d 794 (Colo. 1990); *accord* **Mabry v. Tom Sanger & Co.**, 33 P.3d 1206 (Colo. App. 2001).

3. The requirement in paragraph 1 of the instruction that the plaintiff be a licensed broker is based on sections 12-61-102, 12-61-117, and 12-61-119, C.R.S. See **Kerr v. Australia Pac. Res., Ltd.**, 841 P.2d 401 (Colo. App. 1992); *see also* **Barton v. Sittner**, 723 P.2d 153 (Colo. App. 1986); **Brakhage v. Georgetown Assocs., Inc.**, 33 Colo. App. 385, 523 P.2d 145 (1974). This requirement applies in an action for a commission for the sale of a business if the sale includes a transfer of any interest in real estate, even though the latter is not a dominant feature of the whole transaction. See **Broughall v. Black Forest Dev. Co.**, 196 Colo. 503, 593 P.2d 314 (1978) (overruling **Cary v. Borden Co.**, 153 Colo. 344, 386 P.2d 585 (1963), in effect, because of an intervening change in the statutory definition of real estate broker); *see also* **Lieff v. Medco Profl Servs. Corp.**, 973 P.2d 1276 (Colo. App. 1998) (licensure requirements of statute apply where entire stock of corporation which holds leasehold interest in property is sold).

4. While a broker licensed in another state may receive a share of a commission on a cooperative transaction with a broker licensed in Colorado, *see* § 12-61-101(2)(b)(XIV), C.R.S., such a broker may not, because of the provisions of section 12-61-102, recover the commission (or a share of the commission) directly in his or her own right in an action against the seller. Notwithstanding this restriction, such a broker may, however, sue the seller directly as an assignee of the rights of the broker licensed in Colorado or on the basis of his or her own right to recover on the theory of unjust enrichment. **Backus v. Apishapa Land & Cattle Co.**, 44 Colo. App. 59, 615 P.2d 42 (1980). The fact that a broker, otherwise properly licensed, is operating out of a branch office for which a duplicate license has not been obtained does not render commission contracts entered into through such office void. **Holter v. Moore & Co.**, 681 P.2d 962 (Colo. App. 1983) (analyzing a former version of section 12-61-103(2), C.R.S., that required a separate license for each branch office). A corporation acting on its own behalf through its

agent to acquire an interest in real property for itself and another as partners is not required to be licensed as a real estate broker. **Am. W. Motel Brokers, Inc. v. Wu**, 697 P.2d 34 (Colo. 1985) (citing and applying former section 12-61-101(4)(d), C.R.S.).

5. For the definition of a real estate broker, see section 12-61-101(2)(a). When the contract of employment was allegedly entered into by an authorized agent of the broker, numbered paragraph 2 of the instruction should be appropriately modified.

6. "Oral listing contracts for the sale of real estate are valid, and may be implied from surrounding circumstances." **Hayes v. N. Table Mtn. Corp.**, 43 Colo. App. 467, 469, 608 P.2d 830, 831 (1979).

7. Numbered paragraph 4 of the instruction sets out the first basic condition required by section 12-61-201, C.R.S.

8. If more than one broker was employed to find a buyer, the plaintiff must establish that he or she was the first to find a buyer who was ready, willing, and able to make the purchase, and numbered paragraph 4 in such circumstances should be appropriately modified. See **City of Pueblo v. Leach Realty Co.**, 149 Colo. 92, 368 P.2d 195 (1962). This rule does not apply, however, if the parties in their contract have provided otherwise, as, e.g., with an "exclusive" listing contract. See, e.g., **Cooley Inv. Co. v. Jones**, 780 P.2d 29, 31 (Colo. App. 1989) ("Generally, under an exclusive right to sell contract, if the property is sold within the time prescribed, the broker is entitled to a commission, irrespective of how the sale came about.").

9. The plaintiff has proved that he or she "produced" a purchaser when the plaintiff has established that he or she or his or her employee or agent was the efficient agent or procuring cause of the sale, see **Dickey v. Waggoner**, 108 Colo. 197, 114 P.2d 1097 (1941), or that the plaintiff had found a purchaser who was willing to purchase on the terms and conditions originally prescribed by the defendant or on terms the defendant subsequently agreed were acceptable. See **City of Pueblo v. Leach Realty Co.**, 149 Colo. 92, 368 P.2d 195 (1962); **Bradley Realty Inv. Co. v. Schwartz**, 145 Colo. 65, 357 P.2d 638 (1960); see also **Sherman Agency v. Carey**, 195 Colo. 277, 577 P.2d 759 (1978); **Circle T Corp. v. Deerfield**, 166 Colo. 238, 444 P.2d 404 (1968); **Shands v. Wm R. Winton, Ltd.**, 91 P.3d 416 (Colo. App. 2003) (broker entitled to commission even though property sold to entity that seller did not know had been formed by parties with whom broker had been negotiating); **Real Equity Diversification, Inc. v. Coville**, 744 P.2d 756 (Colo. App. 1987).

10. It is not necessary for the plaintiff to prove the defendant actually entered into a contract of sale with the purchaser. **Leach Realty Co.**, 149 Colo. at 94, 368 P.2d at 196; **Brewer v. Williams**, 147 Colo. 146, 362 P.2d 1033 (1961) (by implication); **Mapes**, 151 P.3d at 578

(broker entitled to commission once qualified buyer produced even though seller refuses to consummate transaction); **Mack v. McKanna**, 687 P.2d 1326 (Colo. App. 1984). "To be considered an 'able' purchaser, one . . . need not have cash in hand equivalent to the entire purchase price at the time the offer is made. . . . Rather the offeror must be shown to have had the financial ability to complete the purchase within the time permitted by the offer." **McGill Corp. v. Werner**, 631 P.2d 1178, 1180 (Colo. App. 1981); *see also* **Daybreak Constr. Specialties, Inc. v. Saghatoleslami**, 712 P.2d 1028, 1032 (Colo. App. 1985) (same definition of "able"). Depending on the circumstances of the particular case, another instruction defining "produced" in numbered paragraph 4 may be necessary or the paragraph should be modified to state the requirement in terms more relevant to the particular facts in dispute between the parties. *See* **Winston Fin. Grp., Inc. v. Fults Mgmt., Inc.**, 872 P.2d 1356 (Colo. App. 1994) (where broker sets in motion a chain of events that, without break in continuity, results in lease of commercial property, broker is the procuring cause of lease and is entitled to a commission). *But see* § 12-61-201 (broker is not entitled to commission until the sale is consummated or defeated by the refusal or neglect of the owner to consummate the sale); § 12-61-202, C.R.S. (broker is not entitled to commission when a proposed purchaser fails to complete the purchase because of title defects).

11. Numbered paragraph 5 sets out the second basic condition required by section 12-61-201. *See also* **Colo. Inv. Servs., Inc. v. Hager**, 685 P.2d 1371 (Colo. App. 1984).

12. Where the defendant's neglect is the failure to bring legal proceedings to correct title defects to which the purchaser objects, section 12-61-202 and section 12-61-203, C.R.S., are applicable. In such circumstances, numbered paragraph 4 and, if necessary, paragraph 5 must be appropriately modified.

13. "[A] seller may not defeat a broker's right to a commission by rejecting an offer solicited by his broker, without explanation, when the variations between [the terms and conditions of] the listing and the offer are of a minor nature . . . . [T]he broker should be given the opportunity to rectify minor variations . . . . However, where . . . the variation between the offer and the listing is substantial, a seller [may] reject the offer without explanation, and the broker may not use the failure to state specific objections as grounds for claiming a commission." **Horton-Cavey Realty Co. v. Reese**, 34 Colo. App. 323, 328, 527 P.2d 914, 917 (1974); *see* **McGill Corp. v. Werner**, 631 P.2d 1178 (Colo. App. 1981) (minor and immaterial variations). Also, the "broker is charged with knowledge that the substantial variation exists when he submits the offer." **Colo. City Dev. Co. v. Jones-Healy Realty, Inc.**, 195 Colo. 114, 116-17, 576 P.2d 160, 162 (1978); *see* **Brady v. Hoeppner**, 38 Colo. App. 495, 558 P.2d 1009 (1977) (broker not entitled to commission when sale fails because of a defect of title or a contingency of which the broker was aware when he was employed); *see also* **Re/Max Suburban, Inc. v. Widener**, 633 P.2d 530 (Colo. App. 1981) (broker not

entitled to commission when sale failed to close due to fault of broker).

## **CHAPTER 31. WRONGFUL DISCHARGE**

### **A. BREACH OF CONTRACT CLAIMS**

- 31:1 Breach of Employment Contract for a Definite Period of Time—Elements of Liability
- 31:2 Employment Contract Providing for Fixed Term Salary—Cautionary Instruction
- 31:3 Breach of Employment Contract for an Indefinite Period of Time Requiring Good or Just Cause for Termination—Elements of Liability
- 31:4 Breach of Implied Contract Based on Violation of Employer's Termination Policies or Procedures—Elements of Liability
- 31:5 At-Will Employment—Defined
- 31:6 Good or Just Cause—Defined
- 31:7 General Damages for Wrongful Discharge—Breach of Contract Claim
- 31:8 Mitigation of Damages for Wrongful Discharge
- 31:9 Constructive Discharge—Defined
- 31:10 Constructive (Implied) Discharge
- 31:11 Affirmative Defense to Contract Claim—After-Acquired Evidence of Fraud or Other Misconduct

### **B. TORT CLAIMS**

- 31:12 Tort Claim for Wrongful Discharge Based on Violations of Public Policy—Employer's Retaliation Against an Employee for Refusal to Comply with Employer's Improper Directive—Elements of Liability
- 31:13 Tort Claim for Wrongful Discharge Based on Violations of Public Policy—Employer's Retaliation Against an Employee for Exercising a Right or Performing a Public Duty—Elements of Liability
- 31:14 Advisory Instruction on Wrongful Discharge in Violation of Public Policy
- 31:15 Damages for Wrongful Discharge—Tort Claim
- 31:16 Affirmative Defense to Damages for Public-Policy Discharge Claim—After-Acquired Evidence of Fraud or Other Misconduct

**A. BREACH OF CONTRACT CLAIMS****31:1 BREACH OF EMPLOYMENT CONTRACT FOR  
A DEFINITE PERIOD OF TIME—  
ELEMENTS OF LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim for breach of an employment contract for a definite period of time, you must find that all of the following have been proved by a preponderance of the evidence:

1. The plaintiff and the defendant entered into a contract of employment;
2. The contract provided that the employment would continue for a definite period of time;
3. The defendant (constructively) discharged the plaintiff before the end of that period of time;
4. Before the plaintiff was discharged, (he) (she) ([substantially] performed [his] [her] part of the contract) (had some justification for not performing [his] [her] part of the contract); and
5. The plaintiff had (injuries) (damages) (losses) as a result of the (constructive) discharge.

If you find that any of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been

proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. Use whichever parenthesized words or phrases are appropriate.

2. Where the defendant raises issues regarding the existence of the employment contract itself, additional instructions relating to the formation of contracts may be necessary. *See* Chapter 30 (instructions and affirmative defenses to breach of contract claims). To instruct as to what constitutes an employment relationship, Instruction 8:4, appropriately modified, may be used. Where the plaintiff asserts justification for non-performance, additional instructions may be necessary. *See, e.g.,* Instruction 30:12.

3. If there is a factual dispute as to whether the employment contract was for a definite period of time, see the Notes on Use to Instruction 31:5 (defining at-will employment). *See* **Pickell v. Ariz. Components Co.**, 931 P.2d 1184 (Colo. 1997); **Dorman v. Petrol Aspen, Inc.**, 914 P.2d 909 (Colo. 1996).

### Source and Authority

1. This instruction is supported by **Western Distributing Co. v. Diodosio**, 841 P.2d 1053 (Colo. 1992); **Nelson v. Centennial Casualty Co.**, 130 Colo. 66, 273 P.2d 121 (1954); **Saxonia Mining & Reduction Co. v. Cook**, 7 Colo. 569, 4 P. 1111 (1884); and **Pittman v. Larson Distributing Co.**, 724 P.2d 1379 (Colo. App. 1986).

2. Good or just cause for the discharge is an affirmative defense that must be raised and proved by the employer. **Diodosio**, 841 P.2d at 1058; **Pittman**, 724 P.2d at 1386. For a discussion of good or just cause, see Instruction 31:6.

3. Where an employer discovers a misrepresentation on an employment application or résumé after the employee has been terminated for other reasons, such “after-acquired evidence” is a complete defense to a claim for wrongful discharge predicated on breach of contract or promissory estoppel, if the employer shows that the employee’s misrepresentation was material and that “a reasonable, objective employer would not have hired the employee if it had discovered the misrepresentation at the outset.” **Crawford Rehab. Servs., Inc. v. Weissman**, 938 P.2d 540, 549 (Colo. 1997); *see* Instruction 31:11.

4. A breach of a covenant of good faith and fair dealing in an employment contract does not give rise to a tort claim. **Decker v. Browning-Ferris Indus., Inc.**, 931 P.2d 436 (Colo. 1997); **Decker v. Browning-Ferris Indus., Inc.**, 947 P.2d 937 (Colo. 1997). Moreover, to be judicially enforceable, such a covenant must be “sufficiently specific so as to allow a court to determine whether a breach has occurred and to adopt an appropriate remedy for any breach.” **Valdez v. Cantor**, 994 P.2d 483, 487 (Colo. App. 1999); see **Hoyt v. Target Stores**, 981 P.2d 188 (Colo. App. 1998) (vague assurances of fair treatment are unenforceable).

## 31:2 EMPLOYMENT CONTRACT PROVIDING FOR FIXED TERM SALARY—CAUTIONARY INSTRUCTION

A determination that a contract of employment was for a definite period of time may not be based solely on evidence that the contract provided for an annual salary (or similar fixed term rate of pay). However, you may consider such evidence, together with all the other evidence in the case, in determining whether the employment contract was for a definite period of time.

### Notes on Use

This instruction should be given with Instruction 31:1 when there is a factual dispute as to whether the contract of employment was for a definite term and there is evidence that the contract provided for an annual salary or similar fixed term rate of pay. *See, e.g., Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909 (Colo. 1996) (where provisions in employment contract created ambiguities regarding term of employment, trial court erred in granting summary judgment in favor of employer).

### Source and Authority

This instruction is based on **Justice v. Stanley Aviation Corp.**, 35 Colo. App. 1, 530 P.2d 984 (1974). *See also Lee v. Great Empire Broad., Inc.*, 794 P.2d 1032 (Colo. App. 1989) (agreement to guarantee an employee a certain sum during a particular period of time did not necessarily constitute an agreement or guarantee that the employment relationship was to continue for such period).

**31:3 BREACH OF EMPLOYMENT CONTRACT FOR  
AN INDEFINITE PERIOD OF TIME  
REQUIRING GOOD OR JUST CAUSE FOR  
TERMINATION—ELEMENTS OF  
LIABILITY**

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on *(his)* *(her)* claim for breach of an employment contract for an indefinite period of time, you must find that all of the following have been proved by a preponderance of the evidence:

1. The plaintiff and the defendant entered into a contract of employment;
2. The contract provided that the plaintiff would not be discharged without good or just cause;
3. The plaintiff was (constructively) discharged by the defendant;
4. Before the plaintiff was discharged, *(he)* *(she)* ([substantially] performed [his] [her] part of the contract) (had some justification for not performing [his] [her] part of the contract); and
5. The plaintiff had (injuries) (damages) (losses) as a result of the (constructive) discharge.

If you find that any of these *(number)* statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been

proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate.

2. If the defendant raises issues regarding the existence of the employment contract itself, additional instructions relating to the formation of contracts may be necessary. See Chapter 30 (instructions and affirmative defenses to breach of contract claims). To instruct as to what constitutes an “employment relationship,” Instruction 8:4, appropriately modified, may be used.

3. If there is a factual dispute as to whether the employment contract provided that plaintiff would not be discharged without cause, see the Notes on Use to Instruction 31:5.

4. If the employee’s breach of contract claim is based on the employer’s personnel policies or procedures, Instruction 31:4 should be used rather than this instruction.

### Source and Authority

1. This instruction is supported by **Western Distributing Co. v. Diodosio**, 841 P.2d 1053 (Colo. 1992); **Nelson v. Centennial Casualty Co.**, 130 Colo. 66, 273 P.2d 121 (1954); **Saxonia Mining & Reduction Co. v. Cook**, 7 Colo. 569, 4 P. 1111 (1884); and **Pittman v. Larson Distributing Co.**, 724 P.2d 1379 (Colo. App. 1986).

2. Good or just cause for the discharge is an affirmative defense that must be raised and proved by the employer. **Diodosio**, 841 P.2d at 1058; **Pittman**, 724 P.2d at 1386. For a discussion of good or just cause, see Instruction 31:6.

**31:4 BREACH OF IMPLIED CONTRACT BASED ON  
VIOLATION OF EMPLOYER'S  
TERMINATION POLICIES OR  
PROCEDURES—ELEMENTS OF  
LIABILITY**

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on *(his)* *(her)* claim for breach of an employment contract, you must find that all of the following have been proved by a preponderance of the evidence:

1. The defendant had a *(insert description of appropriate document, e.g., "employee handbook, personnel manual," etc.)* which was in effect at the time the plaintiff was *(constructively)* discharged by the defendant;

2. The *(employee handbook, personnel manual, etc.)* set forth *(policies)* *(and)* *(or)* *(procedures)* regarding the discharge of the defendant's employees, such as the plaintiff;

3. The defendant demonstrated to such employees a willingness to be bound by such *(policies)* *(and)* *(or)* *(procedures)*;

4. The plaintiff was aware of the existence of the *(employee handbook, personnel manual, etc.)* before *(he)* *(she)* was discharged by the defendant;

5. The plaintiff reasonably understood that the defendant was offering the *(employee handbook, personnel manual, etc.)* as part of the terms and conditions of *(his)* *(her)* employment, and, with that understanding, the plaintiff *(began)* *(continued)* *(his)* *(her)* employment with the defendant;

6. The defendant *(constructively)* discharged the plaintiff without complying with the termination *(policies)* *(procedures)* set forth in its *(employee handbook, personnel manual, etc.)*; and

7. Until discharged, the plaintiff (substantially) performed (his) (her) part of the contract (or the plaintiff had some justification for nonperformance).

If you find that any of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate.

2. Where the defendant raises issues regarding the existence of the employment contract itself, additional instructions relating to the formation of contracts may be necessary. See Chapter 30 (instructions and affirmative defenses to breach of contract claims). To instruct as to what constitutes an "employment relationship," Instruction 8:4, appropriately modified, may be used. Where the plaintiff asserts justification for non-performance, additional instructions may be necessary. See, e.g., Instruction 30:12.

3. This instruction should be used where an employee seeks recovery for breach of contract on the theory that a personnel manual, employee handbook, or other such document, unilaterally published by the employer, constitutes part of the terms of an employment contract that would otherwise be terminable at will. See, e.g., **Continental Air Lines, Inc. v. Keenan**, 731 P.2d 708 (Colo. 1987).

4. In cases involving claims against public entities, this instruction may have to be modified, and in some cases it may not be applicable at all. *See, e.g., Adams Cty. Sch. Dist. No. 50 v. Dickey*, 791 P.2d 688 (Colo. 1990); *Dep't of Health v. Donahue*, 690 P.2d 243 (Colo. 1984); *Seeley v. Bd. of Cty. Comm'rs*, 791 P.2d 696 (Colo. 1990) (sheriff prohibited by statute from adopting manual restricting his statutory authority to discharge deputy sheriff); *Shaw v. Sargent Sch. Dist. No. 33-J*, 21 P.3d 446 (Colo. App. 2001) (school district's promise concerning early retirement policy was conditional on the availability of appropriated funds); *Ness v. Glasscock*, 781 P.2d 137 (Colo. App. 1989); *see also Kuta v. Joint Dist. No. 50(J)*, 799 P.2d 379 (Colo. 1990); *Chellsen v. Pena*, 857 P.2d 472 (Colo. App. 1992) (where city charter provided that probationary employees were terminable at will, probationary firefighters remained terminable at will regardless of any express or implied statements to the contrary by city officials).

5. If the employee manual or handbook requires cause for termination, see Instruction 31:6. For a discussion regarding the burden of proof on cause for termination, see Notes on Use to Instructions 31:1 and 31:3.

### Source and Authority

1. This instruction is supported by *Crawford Rehabilitation Services, Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997); *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909 (Colo. 1996) (offer letter susceptible to the interpretation that it provided for employment of a specific term); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988); and *Keenan*, 731 P.2d at 711–12.

2. The Colorado Supreme Court first recognized the implied-contract exception to the employment-at-will doctrine in *Keenan*, 731 P.2d at 711–12. Under this theory, the employee must show that the employer's promulgation of termination policies or procedures was an offer and that the employee's initial or continued employment constituted an acceptance of that offer. *See Churchey*, 759 P.2d at 1348. Further, for such an offer to be effective, it must be communicated to the employee. *Kuta*, 799 P.2d at 382; *see also Watson v. Pub. Serv. Co.*, 207 P.3d 860 (Colo. App. 2008) (most advertisements are mere notices and solicitations for offers and create no power of acceptance in the recipient).

3. In *Churchey*, 759 P.2d at 1348–49, the court, in reference to a breach of contract theory of recovery, quoted the following language from *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 892 (Mich. 1980):

While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the

employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation".

4. For assistance in determining whether the language of an employee handbook or manual is sufficiently clear or specific to constitute an offer, see **Tuttle v. ANR Freight System, Inc.**, 797 P.2d 825 (Colo. App. 1990); and **Cronk v. Intermountain Rural Electric Ass'n**, 765 P.2d 619 (Colo. App. 1988). See also **Soderlun v. Pub. Serv. Co.**, 944 P.2d 616 (Colo. App. 1997) (discussing whether oral and written statements of employer were sufficiently definite to constitute legally enforceable promise or commitment).

5. Whether an employer and an employee have entered into a contract based upon an employee handbook or manual is generally a question of fact. **Tuttle**, 797 P.2d at 827; **DeRubis v. Broadmoor Hotel, Inc.**, 772 P.2d 681 (Colo. App. 1989); **Cronk**, 765 P.2d at 623.

6. There may be situations where the employee's initial or continued employment does not constitute an acceptance of the employer's offer. See, e.g., **Kuta**, 799 P.2d at 382 (where employees were merely fulfilling preexisting contractual obligations by continuing their employment, such continued employment did not constitute acceptance of offer or necessary consideration to modify contract).

7. Even though an employer does not expressly reserve the right to modify termination policies or procedures set forth in an employee handbook, reservation of such a right is presumed. **Ferrera v. Nielsen**, 799 P.2d 458 (Colo. App. 1990). Consequently, an employee is not entitled to rely on termination procedures in a handbook when the termination procedures are changed by the employer before the employee is discharged, provided that the employer has given the affected employee reasonable notice of the change. *Id.* at 461. Further, if the employer has clearly and conspicuously disclaimed any intent to be contractually bound by the termination procedures of an employee handbook, the existence of a contract may be negated as a matter of law. *Id.*; see also **Jaynes v. Centura Health Corp.**, 148 P.3d 241 (Colo. App. 2006) (where there is a clear disclaimer, termination

procedures in an employee handbook does not create any contractual rights); **Axtell v. Park Sch. Dist. R-3**, 962 P.2d 319 (Colo. App. 1998) (no implied contract where there was a clear disclaimer of contractual rights); **Middlemist v. BDO Seidman, LLP**, 958 P.2d 486 (Colo. App. 1997) (where employer clearly and conspicuously disclaimed intent to limit right to discharge, summary judgment was appropriate on claim based on employee handbook); **George v. Ute Water Conservancy Dist.**, 950 P.2d 1195 (Colo. App. 1997) (no implied contract where handbook contained clear, conspicuous disclaimers); **Mariani v. Rocky Mtn. Hosp. & Med. Serv.**, 902 P.2d 429 (Colo. App. 1994) (employee failed to establish implied contract where manual contained express disclaimer), *aff'd on other grounds*, 916 P.2d 519 (Colo. 1996); **Schur v. Storage Tech. Corp.**, 878 P.2d 51 (Colo. App. 1994); **Holland v. Bd. of Cty. Comm'rs**, 883 P.2d 500 (Colo. App. 1994) (summary judgment proper where express contract stated employment was "at-will"); **Watson**, 207 P.3d at 869 (clear and conspicuous disclaimers in handbook precluded existence of implied contract). *But see Fair v. Red Lion Inn*, 920 P.2d 820 (Colo. App. 1995) (although employee manual contained conspicuous disclaimer that provisions in manual were not intended to create binding contractual obligations, evidence was sufficient to sustain jury determination that employer, by words or conduct, had modified at-will employment and breached employment contract by discharging employee), *aff'd on other grounds*, 943 P.2d 431 (Colo. 1997).

8. However, even if the employer has disclaimed any intent to be bound by the provisions of an employee handbook, there may be other provisions in the handbook or other documents that are inconsistent with a disclaimer and raise factual issues for the jury to determine regarding whether the employer was contractually bound by such provisions, thus precluding the entry of summary judgment for the employer. *See, e.g., Evenson v. Colo. Farm Bureau Mut. Ins. Co.*, 879 P.2d 402 (Colo. App. 1993); **Allabashi v. Lincoln Nat'l Sales Corp.**, 824 P.2d 1 (Colo. App. 1991) (reasonable jury could have found employment contract existed where evidence showed that, although employee handbook contained a disclaimer providing that employment was at-will, other documents given to employee contained policies requiring just cause for involuntary termination and mandating specific procedures for dismissal); **Cronk**, 765 P.2d at 623.

9. Termination procedures or policies set forth in personnel manuals can also be enforced by an employee under a promissory estoppel theory if, as stated in **Keenan**, 731 P.2d at 712, the employee can show that:

[T]he employer should reasonably have expected the employee to consider the employee manual as a commitment from the employer to follow the termination procedures, that the employee reasonably relied on the termination procedures to his detriment, and that injustice can be avoided only by enforcement of the termination procedures.

See also Source and Authority to Instruction 30:7 (contract formation).

10. Because promissory estoppel is an equitable claim under C.R.C.P. 38(a), there is no right to a jury trial with respect to such claim. **Snow Basin, Ltd. v. Boettcher & Co.**, 805 P.2d 1151 (Colo. App. 1990); see also **Mariani**, 902 P.2d at 435 (employee's promissory estoppel claim was properly resolved by the court and not submitted to the jury); **Pickell v. Ariz. Components Co.**, 902 P.2d 392 (Colo. App. 1994) (employee's claim of promissory estoppel could not be predicated on representations of employer that did not affect material terms of contract for at-will employment), *rev'd on other grounds*, 931 P.2d 1184 (Colo. 1997); **Watson**, 207 P.3d at 868 (employer's statement must be specific and definite to form basis for a promissory estoppel claim).

11. Where an employee discovers a misrepresentation on an employment application or résumé after the employee has been terminated for other reasons, such "after-acquired evidence" is a complete defense to a claim for wrongful discharge predicated on breach of contract or promissory estoppel, if the employer shows that the employee's misrepresentation was material and that "a reasonable, objective employer would not have hired the employee if it had discovered the misrepresentation at the outset." **Crawford Rehab. Servs.**, 938 P.2d at 549; see Instruction 31:11.

12. An employee disciplinary procedure adopted by a private employer is not subject to the requirements of the Fourteenth Amendment and, therefore, need not comply with traditional notions of procedural due process. **Floyd v. Coors Brewing Co.**, 952 P.2d 797 (Colo. App. 1997), *rev'd on other grounds*, 978 P.2d 663 (Colo. 1999). And if an employee relies on an employee handbook or other written policy as the basis for an implied contract or promissory estoppel claim, the employee must accept the entire policy and may not accept only those parts of the policy that are favorable to the employee's claim. *Id.*; **Collins v. Colo. Mountain Coll.**, 56 P.3d 1132 (Colo. App. 2002) (grievance procedures contained in college's policy manual did not create implied contract with instructor whose employment was at-will where policy manual expressly stated that grievance procedures did not apply to temporary employees).

13. In **Lucht's Concrete Pumping, Inc. v. Horner**, 255 P.3d 1058, 1061 (Colo. 2011), the Colorado Supreme Court determined that continuing the employment of an existing at-will employee is adequate consideration to support a noncompetition agreement signed by the employee during an existing employment relationship: "Because an employer may terminate an at-will employee at any time during the employment relationship as a matter of right, its forbearance from terminating that employee is the forbearance of a legal right. As such, . . . forbearance constitutes adequate consideration to support a noncompetition agreement with an existing at-will employee."

## 31:5 AT-WILL EMPLOYMENT—DEFINED

An at-will employment exists when an employee is hired for an indefinite period of time and there is no agreement limiting the employer's right to discharge the employee. An at-will employment may be terminated at any time by either the employer or the employee without notice or cause.

### Notes on Use

1. This instruction may be used with Instructions 31:1, 31:3, or 31:4 where an employee is asserting a claim for wrongful discharge based on breach of an employment contract and there is a factual question as to whether the employment was at-will.

2. This instruction should not be given if plaintiff is asserting a tort rather than a contract claim for wrongful discharge. If plaintiff is asserting both contract and tort claims for wrongful discharge and this instruction is given, the jury should be advised that the existence of an at-will employment relationship does not preclude the plaintiff from recovering in tort.

### Source and Authority

1. This instruction is supported by **Crawford Rehabilitation Services, Inc. v. Weissman**, 938 P.2d 540 (Colo. 1997); **Continental Air Lines, Inc. v. Keenan**, 731 P.2d 708 (Colo. 1987); **Churchey v. Adolph Coors Co.**, 759 P.2d 1336 (Colo. 1988).

2. Generally, when an employee is hired for an indefinite period of time, in the absence of special consideration or an agreement to the contrary, there is an at-will employment relationship which may be terminated at any time either by the employer or by the employee without notice or cause, and the termination of such an employment relationship does not give rise to any liability for breach of contract. **Crawford Rehab. Servs.**, 938 P.2d at 546; **Pickell v. Ariz. Components Co.**, 931 P.2d 1184 (Colo. 1997); **Adams Cty. Sch. Dist. No. 50 v. Dickey**, 791 P.2d 688 (Colo. 1990); **Churchey**, 759 P.2d at 1348; **Keenan**, 731 P.2d at 711; **Jaynes v. Centura Health Corp.**, 148 P.3d 241 (Colo. App. 2006); **Wisehart v. Meganck**, 66 P.3d 124 (Colo. App. 2002); **Collins v. Colo. Mountain Coll.**, 56 P.3d 1132 (Colo. App. 2002); **Herrera v. San Luis Cent. R.R.**, 997 P.2d 1238 (Colo. App. 1999); **Middlemist v. BDO Seidman, LLP**, 958 P.2d 486 (Colo. App. 1997); **Mariani v. Rocky Mtn. Hosp. & Med. Serv.**, 902 P.2d 429 (Colo. App. 1994), *aff'd on other grounds*, 916 P.2d 519 (Colo. 1996); **Holland v. Bd. of Cty. Comm'rs**, 883 P.2d 500 (Colo. App. 1994); **Evenson v. Colo. Farm Bureau Mut. Ins. Co.**, 879 P.2d 402

(Colo. App. 1993); **Cronk v. Intermountain Rural Elec. Ass'n**, 765 P.2d 619 (Colo. App. 1988); **Hoff v. Amalgamated Transit Union**, 758 P.2d 674 (Colo. App. 1987); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986); **Hughes v. Mountain States Tel. & Tel. Co.**, 686 P.2d 814 (Colo. App. 1984); **Lampe v. Presbyterian Med. Ctr.**, 41 Colo. App. 465, 590 P.2d 513 (1978); **Justice v. Stanley Aviation Corp.**, 35 Colo. App. 1, 530 P.2d 984 (1974). Contractual liability can arise from the discharge of an otherwise terminable at-will employee only where there is an express or implied contract limiting or restricting the employer's right to terminate the relationship. **Hoff**, 758 P.2d at 678.

3. The "at-will" doctrine applicable to employment for an indefinite period of time is a substantive rule of law and not an evidentiary presumption. **Schur v. Storage Tech. Corp.**, 878 P.2d 51 (Colo. App. 1994) (employee may establish exception to "at-will" doctrine by establishing that (1) terms of employment agreement restricted employer's right to discharge employee, (2) policy statements of the employer restricting the employer's right to discharge were accepted as part of the employment contract or relied upon by the employee under circumstances giving rise to a promissory estoppel, or (3) the discharge violated public policy); *see* Instructions 31:3, 31:4, 31:12, 31:13. However, an employee who is hired without an express contract has the burden of pleading and proving an exception to the existence of an at-will employment relationship. **Jaynes**, 148 P.3d at 243.

4. In the absence of special consideration or an agreement to the contrary, a contract for permanent employment is no more than an indefinite general hiring terminable at the will of either party. **Justice**, 35 Colo. App. at 3-4, 530 P.2d at 985; *see also* **Schur**, 878 P.2d at 54 (employee's expertise in job that he was hired to perform did not constitute "special consideration"). In **Pittman**, 724 P.2d at 1383, the court held that if there is evidence of "special consideration," it is ordinarily for the jury to determine the meaning of "permanent," when used in an oral contract of employment, in light of all of the circumstances surrounding the making of the agreement. *See also* **Pickell**, 931 P.2d at 1186.

5. Also, unless the circumstances indicate otherwise, a contract which sets forth an annual salary rate, but states no definite term of employment, is considered to be an indefinite general hiring, terminable at the will of either party. **Justice**, 35 Colo. App. at 4, 530 P.2d at 985; *see also* **Lee v. Great Empire Broad., Inc.**, 794 P.2d 1032 (Colo. App. 1989) (an agreement to "guarantee" an employee a certain sum during a particular period of time did not necessarily constitute an agreement that the employment relationship was to continue for that period).

6. In **Wisehart v. Meganck**, 66 P.3d 124 (Colo. App. 2002), the court declined to recognize an exception to the at-will employment doctrine where the employer allegedly used fraud or deception to justify

terminating an at-will employee. The court concluded that since all of the employee's claimed damages arose from the termination of his employment, his fraud claims were barred by the employment at-will doctrine.

7. In **Lucht's Concrete Pumping, Inc. v. Horner**, 255 P.3d 1058, 1061 (Colo. 2011), the Colorado Supreme Court determined that continuing the employment of an existing at-will employee is adequate consideration to support a noncompetition agreement signed by the employee during an existing employment relationship: "Because an employer may terminate an at-will employee at any time during the employment relationship as a matter of right, its forbearance from terminating that employee is the forbearance of a legal right. As such, . . . forbearance constitutes adequate consideration to support a noncompetition agreement with an existing at-will employee."

## 31:6 GOOD OR JUST CAUSE—DEFINED

### No instruction provided.

#### Note

1. When required, an instruction defining “good and just cause” should be used with Instructions 31:1, 31:3 and 31:4. If the employment contract, handbook, personnel manual, etc., contains a definition or examples of what constitutes “cause” or “good and just cause,” this instruction should set out those examples. If the employment contract, handbook, personnel manual, etc., does not define “cause,” the court may be required to formulate an appropriate instruction informing the jury of what “good or just cause” for termination of employment means.

2. Colorado appellate courts have not yet addressed the following questions, among others, that might be raised by this type of instruction:

a. Whether the test is an objective or subjective one;

b. What constitutes legally sufficient or legally insufficient causes (apart from the clearly insufficient ones such as discrimination on an impermissible basis);

c. The consequences of a “mixed motive” termination (e.g., the employer’s termination decision is based in part on factors that are recited in the manual or are legally sufficient and in part on factors that are not included in the manual or are legally insufficient);

d. Whether “good or just cause” necessarily incorporates components of “due process” (i.e., notice, opportunity to be heard, etc.); or

e. Whether the meaning of the term “good or just cause” is a question of law for the court or a factual question for the jury to determine in light of the facts and circumstances of a given case.

3. In **Adams v. Frontier Airlines Federal Credit Union**, 691 P.2d 352 (Colo. App. 1984), the court held that whether an employee’s job performance was adequate was a question for the trier of fact to determine, notwithstanding the employer’s claim that its determination of inadequacy was based on competent evidence and was, therefore, conclusive. Thus, the court implicitly rejected the employer’s subjective good faith determination as a standard for good or just cause.

4. In **Fredrickson v. Denver Public School District No. 1**, 819 P.2d 1068 (Colo. App. 1991), the court construed the “good and just cause” provision of the statute setting forth the grounds for dismissal of a public school teacher with tenure, now section 22-63-301, C.R.S., as requiring conduct that adversely impacts a teacher’s fitness to perform

his or her job duties or that materially and substantially affects his or her job performance. *See also* **Bd. of Educ. v. Flaming**, 938 P.2d 151 (Colo. 1997); **Snyder v. Jefferson Cty. Sch. Dist. R-1**, 842 P.2d 624 (Colo. 1992); **Sch. Dist. No. 1 v. Cornish**, 58 P.3d 1091 (Colo. App. 2002) (allowing teaching certificate to lapse and not informing school officials of such lapse constituted “other good and just cause” for terminating teacher’s employment); **Kerin v. Bd. of Educ.**, 860 P.2d 574 (Colo. App. 1993).

5. In **Barham v. University of Northern Colorado**, 964 P.2d 545 (Colo. App. 1997), the court held that a section of the university code providing for termination of tenured faculty only for “legally sufficient ground or reason” was not impermissibly vague and, therefore, did not violate tenured professor’s right to substantive due process or equal protection.

### 31:7 GENERAL DAMAGES FOR WRONGFUL DISCHARGE—BREACH OF CONTRACT CLAIM

If you find in favor of the plaintiff, *(name)*, on (his) (her) claim for breach of an employment contract, then you must award (him) (her) actual or nominal damages.

To award actual damages, you must find by a preponderance of the evidence that the plaintiff incurred actual damages as a result of the breach and the amount of those damages.

To the extent that actual damages have been proved by the evidence, you shall award as actual damages:

1. The amount of earnings and benefits the plaintiff would have received under the terms of the contract during the full term of the contract:

- a. Less any expenses arising from the contract which (he) (she) did not have to pay because the contract was ended; and
- b. Less any amount (he) (she) earned from any replacement employment; and
- c. Less any amount (he) (she) reasonably could have earned from any replacement employment.

2. *(Insert the proper measure of any recoverable special damages of which there is sufficient evidence)*, provided, as to these damages, you find by a preponderance of the evidence (a) that they were a natural and probable consequence of the claimed breach of the contract by the defendant, *(name)*, and (b) that, at the time the parties entered into the contract, the defendant reasonably could have anticipated from the facts or circumstances that the defendant knew or should have

known that these damages would probably be incurred by the plaintiff if the defendant breached the contract.

If you find in favor of the plaintiff, but do not find any actual damages, you shall nonetheless award (him) (her) nominal damages in the sum of one dollar.

### Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate.
2. Except when the amount of damages is not in dispute, for example, liquidated damages or the amount due on a promissory note, the instruction should not state the amount of damages sought. *See Rodrigue v. Hausman*, 33 Colo. App. 305, 519 P.2d 1216 (1974).
3. Omit either numbered paragraph 1 or 2 if inapplicable.
4. If there is sufficient evidence that the plaintiff may not have reasonably mitigated his or her damages by seeking other employment, paragraph 1c of this instruction should be given together with Instruction 5:2. An employee's duty to mitigate or minimize damages includes duty to accept unconditional offer of reinstatement if no special circumstances exist to justify rejection of offer. *Fair v. Red Lion Inn*, 943 P.2d 431 (Colo. 1997) (employee's rejection of employer's unconditional offer of reinstatement resulted in loss of any claim for damages for back pay from date of offer).
5. In any case where, in mitigating damages, the plaintiff has incurred additional expenses, such damages may be recovered as special damages. *See, e.g., Sch. Dist. No. 3 v. Nash*, 27 Colo. App. 551, 140 P. 473 (1914); *see also* Instruction 31:8 (mitigation of damages for wrongful discharge).
6. For authorities on the measure of damages in breach of contract cases in general, see the Source and Authority to Instruction 30:37.

### Source and Authority

1. This instruction is supported by *Colorado School of Mines v. Neighbors*, 119 Colo. 399, 203 P.2d 904 (1949) (plaintiff entitled only to nominal damages where his earnings after the breach exceeded those he would have earned under the contract); *Ryan v. School District No. 2*, 68 Colo. 370, 189 P. 782 (1920); and *Saxonia Mining & Reduction Co. v. Cook*, 7 Colo. 569, 4 P. 1111 (1884). *See also Tech. Comput. Servs., Inc. v. Buckley*, 844 P.2d 1249 (Colo. App. 1992) (damages reduced by amount of salary received from other employ-

ment); **Adams v. Frontier Airlines Fed. Credit Union**, 691 P.2d 352 (Colo. App. 1984) (plaintiff entitled to recover value of benefits employment contract provided including employer's pension contributions, life, health and dental insurance, and use of car); **C. McCORMICK, DAMAGES** §§ 158-62 (1935).

2. For additional damages that an employee may be entitled to recover upon termination as a civil penalty for an employer's refusal, without a good faith legal justification, to pay compensation promptly when due, see section 8-4-109, C.R.S. (formerly § 8-4-104, C.R.S.); **Jet Courier Services, Inc. v. Mulei**, 771 P.2d 486, 500-01 (Colo. 1989) (discussing the statute); **Porter v. Castle Rock Ford Lincoln Mercury, Inc.**, 895 P.2d 1146 (Colo. App. 1995); and **Technical Computer Services**, 844 P.2d at 1253. *See also Carruthers v. Carrier Access Corp.*, 251 P.3d 1199 (Colo. App. 2010) (prevailing employees and employers may recover attorney fees and costs under the wage statute unless the wage claim is for less than \$7,500, in which case only employers may recover such costs if the court finds that the employee's wage claim is frivolous); **Lee v. Great Empire Broad., Inc.**, 794 P.2d 1032 (Colo. App. 1989) (wage statute applies only to wages earned and unpaid at the time of employee's discharge).

3. As to when a plaintiff may be entitled to recover interest on damages for breach of contract, generally, see Note 5 of the Introductory Note to Part E of Chapter 30. *See also Shannon v. Colorado Sch. of Mines*, 847 P.2d 210 (Colo. App. 1992) (prejudgment interest on damages for loss of future profits not recoverable).

4. Under the collateral source rule, damages awarded for breach of an employment contract cannot be reduced by the amount of unemployment benefits received by the discharged employee. **Tech. Comput. Servs.**, 844 P.2d at 1254-55.

5. If an employee is discharged in violation of the procedural provisions of a personnel manual or handbook, see Instruction 31:4, but the employer establishes "good or just cause" for the discharge, an award of nominal damages may be appropriate. *See Rogers v. Bd. of Trs.*, 859 P.2d 284 (Colo. App. 1993).

### 31:8 MITIGATION OF DAMAGES FOR WRONGFUL DISCHARGE

If an employee is wrongfully discharged, that employee must take reasonable steps to reduce or minimize the damages that might result from that discharge. However, the employee is not required to take any steps that would not be reasonable under all of the circumstances.

The defendant, *(name)*, has the burden of proving that plaintiff, *(name)*, did not take reasonable steps to reduce or minimize (his) (her) damages.

(If you find that:

1. The plaintiff failed to seek other employment that was substantially similar to the position [he] [she] had held with the defendant, and

2. Seeking other similar employment would have been reasonable under all of the circumstances, then you must reduce the amount of any actual damages suffered by the plaintiff by the amount of any earnings and benefits [he] [she] might reasonably have expected to earn from that other employment during any period during which you find that the plaintiff suffered damages, as Instruction No. *[insert instruction number that corresponds to Instruction 31:7 or 31:15]* instructs you to do.)

(If you find that:

1. After the plaintiff was discharged, the defendant offered to re-employ the plaintiff [in the same position from which (he) (she) was discharged] [in another position with substantially the same compensation, benefits and responsibilities as (he) (she) had before the discharge], and

2. That offer was made without requiring the plaintiff to waive any right [he] [she] might have and

was not dependent upon some other improper requirement, and

3. The plaintiff failed to accept that offer, then you may not award to the plaintiff any amount for earnings or benefits for any period after [he] [she] failed to accept the defendant's offer of re-employment unless you also find that the plaintiff has proved that there were special circumstances that reasonably justified the failure to accept that offer of re-employment.)

#### Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate.

2. For a general description of when the issue of mitigation of damages should be submitted to the jury, see the Notes on Use to Instruction 5:2.

#### Source and Authority

1. This instruction is supported by **Fair v. Red Lion Inn**, 943 P.2d 431 (Colo. 1997).

2. The defense of mitigation of damages can be asserted as an affirmative defense to either a tort claim for wrongful discharge in violation of public policy, *see* Instructions 31:12 and 31:13, or a claim for a discharge in violation of an express or implied contract, *see* Instructions 31:1, 31:3, and 31:4. Generally, the question of what constitutes a reasonable effort to mitigate damages is to be determined by the trier of fact. **Fitzgerald v. Edelen**, 623 P.2d 418 (Colo. App. 1980). But "the defense of failure to mitigate damages will not be presented to the jury unless the trial court determines there is sufficient evidence to support it." **Fair**, 943 P.2d at 437; *see also* **Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.**, 232 P.3d 277 (Colo. App. 2010) (employee's decision to start her own business did not automatically constitute a failure to mitigate or terminate the accrual of back pay damages, and the formula for such damages is decided as a matter of law).

3. In the case of a discharged employee, if the former employer makes an "unconditional" offer to reinstate the employee to his or her former position or one that has substantially the same compensation, benefits, and responsibilities, the employee is under a duty to accept that offer, unless the employee can demonstrate the existence of "special circumstances" to justify the failure to accept it. In such a case, the employee's right to collect any wages or benefits that would otherwise have

been earned will cease as of the date that the unconditional offer was not accepted. **Fair**, 943 P.2d at 438. *See also* **Ford Motor Co. v. EEOC**, 458 U.S. 219, 102 S. Ct. 3057, 73 L. Ed. 2d 721 (1982) (discharge in violation of Title VII).

4. “Special circumstances” that would justify an employee’s rejection of an unconditional offer of reinstatement have not been defined. However, if the employee asserts that the offer was rejected as not bona fide or because the employee would be retaliated against if he or she returned to the same employment, the employee has the burden of establishing such special circumstances. The employee’s subjective feelings upon the question are insufficient to present an issue for the jury. **Fair**, 943 P.2d at 439–41.

5. Under a special statutory provision governing probationary teachers, § 22-63-203(3), C.R.S., a wrongfully terminated teacher was not obligated to mitigate his damages. **Hanover Sch. Dist. No. 28 v. Barbour**, 171 P.3d 223 (Colo. 2007).

**31:9 CONSTRUCTIVE DISCHARGE—DEFINED**

A constructive discharge occurs when an employer deliberately (makes an employee's working conditions) (or) (allows an employee's working conditions to become) so intolerable that the employee has no reasonable choice but to quit or resign and the employee does quit or resign because of those conditions. However, a constructive discharge does not occur unless a reasonable person would consider those working conditions to be intolerable.

**Notes on Use**

1. When applicable, this instruction should be given with Instructions such as 31:1, 31:3, 31:4, 31:12, and 31:13.
2. Where a constructive discharge claim is based on a violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 to -34 (2018), rather than on state law, the state courts must apply the federal law of constructive discharge developed under that statute. **Evenson v. Colo. Farm Bureau Mut. Ins. Co.**, 879 P.2d 402 (Colo. App. 1993).

**Source and Authority**

This instruction is supported by **Boulder Valley School District R-2 v. Price**, 805 P.2d 1085 (Colo. 1991), *overruled in part on other grounds* by **Cnty. Hosp. v. Fail**, 969 P.2d 667 (Colo. 1998); **Wilson v. Board of County Commissioners**, 703 P.2d 1257 (Colo. 1985); **Koinis v. Colorado Department of Public Safety**, 97 P.3d 193 (Colo. App. 2003) (request for resignation, in and of itself, will not support claim of constructive discharge); **Krauss v. Catholic Health Initiatives Mountain Region**, 66 P.3d 195 (Colo. App. 2003); **Montemayor v. Jacor Commc'ns, Inc.**, 64 P.3d 916 (Colo. App. 2002); and **Christie v. San Miguel County School District R-2(J)**, 759 P.2d 779 (Colo. App. 1988).

**31:10 CONSTRUCTIVE (IMPLIED) DISCHARGE**

Even if the plaintiff resigned from (his) (her) employment, if you find that the words spoken or actions taken by the defendant would have led a reasonable person in the plaintiff's position to believe, and did lead the plaintiff to believe, that (he) (she) had been or was going to be discharged by the defendant, then the plaintiff was, in fact, discharged by the defendant.

**Notes on Use**

1. See the Notes on Use to Instruction 31:9.

2. This instruction should be given if the evidence creates a legitimate issue as to whether the plaintiff's resignation was voluntary or was induced by the employer's conduct that led the plaintiff to believe and would have led a reasonable person in the plaintiff's position to believe that he or she had been or was going to be discharged.

**Source and Authority**

This instruction is supported by **Colorado Civil Rights Commission v. School District No. 1**, 30 Colo. App. 10, 488 P.2d 83 (1971).

## 31:11 AFFIRMATIVE DEFENSE TO CONTRACT CLAIM—AFTER-ACQUIRED EVIDENCE OF FRAUD OR OTHER MISCONDUCT

The defendant, *(name)*, is not liable for breach of an employment contract if you find that the defendant has proved the affirmative defense of after-acquired evidence of (fraud) (misconduct). This affirmative defense is proved if you find all of the following:

1. The plaintiff, *(name)*, *(describe type of misconduct, e.g., concealed or misrepresented a material fact or facts on a résumé with the intent of creating a false impression in the mind of the defendant; committed theft; committed sexual harassment; etc.)*;

2. The defendant did not discover the (concealed or misrepresented fact or facts) (misconduct) until after the plaintiff was discharged; and

3. A reasonable, objective employer (would not have hired) (would have discharged) the plaintiff if it had discovered the (concealed) (misrepresented) fact(s) (misconduct) at the time of the plaintiff's (fraud) (misconduct).

### Notes on Use

Use whichever parenthesized and bracketed words and phrases are appropriate. In paragraph 1, insert specific description of the conduct described.

### Source and Authority

1. This instruction is supported by **Crawford Rehabilitation Services, Inc. v. Weissman**, 938 P.2d 540 (Colo. 1997).

2. Issues of whether a reasonable, objective employer would have hired or terminated an employee if it had known certain facts and questions of intent are generally for the trier of fact. However, if the record establishes that there is no genuine issue as to any material fact, the question becomes one of law for the court. See **Crawford Rehab. Servs.**, 938 P.2d at 550.

3. After-acquired evidence of fraud or misconduct would also bar a

claim of promissory estoppel based on an employer's policies. *Id.* at 549. However, because promissory estoppel is an equitable claim, there is no right to a jury trial with respect to such a claim. **Snow Basin, Ltd. v. Boettcher & Co.**, 805 P.2d 1151 (Colo. App. 1990).

4. The court of appeals decision in **Weissman v. Crawford Rehabilitation Services, Inc.**, 914 P.2d 380 (Colo. App. 1995), extended the doctrine to after-acquired evidence of misconduct that may have occurred after the commencement of the employment relationship. The supreme court's decision expressly did not reach that issue. **Crawford Rehab. Servs.**, 938 P.2d at 548.

5. When after-acquired evidence is presented in a case alleging violation of a public-policy interest, such as violation of Title VII or violation of 29 U.S.C. 621, *et seq.*, then the after-acquired evidence serves to limit damages, but it does not act as a complete defense to the cause of action. **Crawford Rehab. Servs., Inc.**, 938 P.2d 540. **Crawford** declined to apply this limitation to claims for breach of implied contract and promissory estoppel if the employer can prove that the employee's concealment undermined the very basis upon which he or she was hired.

**B. TORT CLAIMS****31:12 TORT CLAIM FOR WRONGFUL DISCHARGE  
BASED ON VIOLATIONS OF PUBLIC  
POLICY—EMPLOYER'S RETALIATION  
AGAINST AN EMPLOYEE FOR REFUSAL  
TO COMPLY WITH EMPLOYER'S  
IMPROPER DIRECTIVE—ELEMENTS OF  
LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim for wrongful discharge in violation of public policy, you must find that all of the following have been proved by a preponderance of the evidence:

1. During the course of the plaintiff's employment with the defendant, the defendant directed the plaintiff (not) to: (*describe the action, omission, or conduct that would have (1) violated a statute, rule, or regulation relating to public health, safety, or welfare, or (2) undermined a public policy relating to plaintiff's basic responsibility as a citizen, or (3) prevented the plaintiff from exercising an important work-related right or privilege*);

2. The plaintiff refused to comply with the defendant's directive because the plaintiff reasonably believed that to do so would have been (illegal) (a violation of a rule) (a violation of a regulation) (contrary to the plaintiff's duty as a citizen) (a violation of the plaintiff's legal right or privilege as a worker);

3. The defendant was aware or reasonably should have been aware that the plaintiff's refusal to comply with the defendant's directive was based on the plaintiff's reasonable belief that to do so would have been (illegal) (a violation of a rule) (a violation of a regulation) (contrary to the plaintiff's duty as a citizen) (a violation of the plaintiff's legal right or privilege as a worker); and

4. The defendant (constructively) discharged the

plaintiff because the plaintiff refused to comply with the defendant's directive.

If you find that any one of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. This instruction and Instruction 31:13 are predicated on **Martin Marietta Corp. v. Lorenz**, 823 P.2d 100 (Colo. 1992), where the court identified the elements of a claim for wrongful discharge under the public-policy exception to the employment at will doctrine. *See also Rocky Mtn. Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519 (Colo. 1996); **Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.**, 186 P.3d 80 (Colo. App. 2008). If the wrongful discharge claim is based on an employee's refusal to obey a directive of the employer, this instruction should be used. If the claim is based on an allegation an employer discharged an employee for exercising a right or duty without any prior order or directive not to exercise such right, Instruction 31:13 should be used.

2. The trial court must determine initially as a matter of law whether the public policy involved is sufficiently specific and serious to support this claim. *See Mariani*, 916 P.2d at 526; **Martin Marietta**, 823 P.2d at 111.

3. The language of Paragraphs 2 and 3 may need to be modified to reflect the source of the public policy supporting the claim, depending

on the facts in the case. **Martin Marietta** identified the sources of public policy as public duties, important job-related rights, and statutes related to public health, safety, or welfare. Cases decided prior to **Martin Marietta** held that a tort claim for wrongful discharge based on a violation of public policy could be maintained only if a specific statutory right or duty was involved, and such a claim could not be based on statutes containing only broad general statements of public policy. *See, e.g., Lathrop v. Entenmann's, Inc.*, 770 P.2d 1367 (Colo. App. 1989); **Cronk v. Intermountain Rural Elec. Ass'n**, 765 P.2d 619 (Colo. App. 1988); **Farmer v. Central Bancorp., Inc.**, 761 P.2d 220 (Colo. App. 1988); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986); **Corbin v. Sinclair Mktg., Inc.**, 684 P.2d 265 (Colo. App. 1984); **Lampe v. Presbyterian Med. Ctr.**, 41 Colo. App. 465, 590 P.2d 513 (1978). More recently, constitutional provisions, municipal ordinances, administrative regulations, professional rules, and accepted public policy have been held to support a claim for wrongful discharge, but only if the public policy involves a matter of serious public concern. *See, e.g., Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997) (administrative regulation providing that employees are entitled to ten minute rest period for each four hour work period does not constitute public-policy mandate sufficient to support tort claim for wrongful discharge); **Mariani**, 916 P.2d at 526 (rules of professional conduct for accountants promulgated by state board of accountancy have sufficient public purpose to constitute public policy for purposes of wrongful discharge claim); **Kearl v. Portage Envtl., Inc.**, 205 P.3d 496 (Colo. App. 2008) (preventing or opposing fraud on the government is a widely accepted public policy for purpose of wrongful discharge claim); **Bonidy**, 186 P.3d at 84–85 (wage orders of Colorado Division of Labor mandating breaks from work implicated public safety where employee's job duties included sterilizing instruments, taking x-rays, and other medical procedures); **Jaynes v. Centura Health Corp.**, 148 P.3d 241 (Colo. App. 2006) (neither ethical standards published by private nurses' association nor statute governing patient quality management provided basis for nurse's claim against hospital for wrongful discharge in violation of public policy); **Slaughter v. John Elway Dodge Southwest/AutoNation**, 107 P.3d 1165 (Colo. App. 2005) (private employee who was allegedly terminated from her employment for refusing to take drug test did not state cause of action for wrongful termination based on violation of public policy); **Herrera v. San Luis Cent. R.R.**, 997 P.2d 1238 (Colo. App. 1999) (retaliatory discharge of employee for obtaining jury verdict under Federal Employer's Liability Act stated claim for wrongful discharge in violation of public policy); **Flores v. Am. Pharm. Servs., Inc.**, 994 P.2d 455 (Colo. App. 1999) (evidence that employee was discharged for reporting insurance fraud of co-employee was sufficient to support claim for wrongful discharge in violation of public policy where state statute declared need to aggressively confront problem of insurance fraud); **Hoyt v. Target Stores**, 981 P.2d 188 (Colo. App. 1998) (evidence that employee was discharged for exercising job-related right to be paid for travel time between stores violated Colorado Wage Claim Act and supported claim for wrongful discharge in violation of public policy); **Webster v. Konczak Corp.**,

976 P.2d 317 (Colo. App. 1998) (retaliatory discharge of an employee for reporting a suspected violation of a regulation promulgated under the Limited Gaming Act may provide a sufficient basis for a claim for wrongful discharge in violation of public policy); *see also* **Coors Brewing Co. v. Floyd**, 978 P.2d 663 (Colo. 1999) (discussing application of public-policy exception to at-will employment doctrine).

4. In some circumstances, Instruction 31:14 should be used with this instruction to permit the jury to determine whether the propositions set forth in paragraphs 2 and 3 of this instruction have been established by a preponderance of the evidence.

### Source and Authority

1. This instruction is supported by **Mariani**, 916 P.2d at 527; **Martin Marietta**, 823 P.2d at 109; and **Middlemist v. BDO Seidman, LLP**, 958 P.2d 486 (Colo. App. 1997).

2. An employee's refusal to perform an illegal act is not limited to verbal expressions of refusal but can consist of inaction as well. **Mariani**, 916 P.2d at 527–28; **Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.**, 232 P.3d 277 (Colo. App. 2010) (evidence of employee's objection to illegal policy followed by her immediate termination is adequate to support requirement that employee refused to perform illegal acts).

3. When a statute creates a duty that did not exist at common law and provides a remedy for a breach of that duty, the statute's remedy is exclusive and precludes an action for wrongful discharge in tort based upon a common-law theory. **Farmers Grp., Inc. v. Williams**, 805 P.2d 419 (Colo. 1991); **Krauss v. Catholic Health Initiatives Mtn. Region**, 66 P.3d 195 (Colo. App. 2003) (alleged violation of Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601 to -654) (2018); **Gamble v. Levitz Furniture Co.**, 759 P.2d 761 (Colo. App. 1988); **Corbin v. Sinclair Mktg., Inc.**, 684 P.2d 265 (Colo. App. 1984).

4. Evidence of omissions or misstatements on employment application form, discovered by the employer after employee was discharged, cannot be relied upon as a complete defense to a tort claim for a retaliatory discharge in violation of public policy, but may provide grounds for limiting the relief available to the employee. **Weissman v. Crawford Rehab. Servs., Inc.**, 914 P.2d 380 (Colo. App. 1995) (adopting after-acquired evidence rule enunciated by the United States Supreme Court in **McKennon v. Nashville Banner Publishing Co.**, 513 U.S. 352 (1995)), *rev'd on other grounds*, 938 P.2d 540 (Colo. 1997); *see* Instruction 31:16.

**31:13 TORT CLAIM FOR WRONGFUL DISCHARGE  
BASED ON VIOLATIONS OF PUBLIC  
POLICY—EMPLOYER’S RETALIATION  
AGAINST AN EMPLOYEE FOR  
EXERCISING A RIGHT OR  
PERFORMING A PUBLIC DUTY—  
ELEMENTS OF LIABILITY**

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on *(his)* *(her)* claim for wrongful discharge, based on a violation of public policy, you must find that all of the following have been proved by a preponderance of the evidence:

1. During the course of employment, plaintiff *(describe the action, omission, or conduct of plaintiff that was (1) an exercise of a statutory, regulatory, or rule-based right relating to public health, safety, or welfare, or (2) a performance of a public duty relating to plaintiff’s basic responsibility as a citizen, or (3) an exercise of an important work-related right or privilege)* because *(he)* *(she)* *(reasonably believed [he][she])* had a right to *(follow the [statute] [regulation] [rule])* *(perform [his] [her] duty as a citizen)* *(exercise [his] [her] right or privilege as a worker)*;

2. The defendant was aware or reasonably should have been aware that plaintiff *(reasonably believed [he] [she])* had a right to *(follow the [statute] [regulation] [rule])* *(perform [his] [her] duty as a citizen)* *(exercise [his] [her] right or privilege as a worker)*; and

3. The defendant *(constructively)* discharged the plaintiff because the plaintiff *(followed the [statute] [rule] [regulation])* *(performed [his] [her] duty as a citizen)* *(exercised [his] [her] right or privilege as a worker)*.

If you find that any one or more of these *(number)* statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (number) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to plaintiff's claim]*).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate. In paragraph 1, specify the plaintiff's conduct asserted.

2. This instruction should be used instead of Instruction 31:12 when an employer discharges an employee for exercising a right or duty without any prior order or directive not to exercise such right or duty. See, e.g., **Lathrop v. Entenmann's, Inc.**, 770 P.2d 1367 (Colo. App. 1989) (discharge allegedly in retaliation for filing workers' compensation claim); **Kearl v. Portage Envtl., Inc.**, 205 P.3d 496 (Colo. App. 2008) (allegations that employee was fired in retaliation for reporting to employer possible fraud on government stated claim for wrongful termination); **Herrera v. San Luis Cent. R.R.**, 997 P.2d 1238 (Colo. App. 1999) (discharge based on securing verdict on claim against employer).

3. See also the Notes on Use to Instruction 31:12.

#### Source and Authority

This instruction is supported by **Lathrop**, 770 P.2d at 1372–73. Paragraph 2 is supported by **Martin Marietta Corp. v. Lorenz**, 823 P.2d 100 (Colo. 1992), and **Kearl**, 205 P.3d at 500.

## 31:14 ADVISORY INSTRUCTION ON WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

If you find that the defendant directed the plaintiff (not) to *(describe action, omission, or conduct set forth in paragraph 1 of Instruction 31:12)*, then you are advised that had the plaintiff complied with the defendant's directive, the plaintiff's conduct would have been (illegal) (contrary to the plaintiff's duty as a citizen) (or) (a violation of the plaintiff's legal right or privilege as a worker).

### Notes on Use

1. Depending on the facts of the case, this instruction may be appropriate when Instruction 31:12 is given.

2. If this instruction is used, insert the specific action, omission, or conduct asserted by plaintiff consistent with that described in Instruction 31:12.

### Source and Authority

This instruction is supported by **Lathrop v. Enternmann's, Inc.**, 770 P.2d 1367 (Colo. App. 1989).

**31:15 DAMAGES FOR WRONGFUL DISCHARGE—  
TORT CLAIM**

Plaintiff, (*name*), has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the wrongful discharge of the plaintiff by the defendant(s), (*name[s]*), (and the [*insert appropriate description, e.g., "negligence"*], if any, of any designated nonparties).

In determining such damages, you shall consider the following:

1. Any noneconomic (losses) (injuries) which the plaintiff has had or will probably have in the future, including: (*insert any recoverable noneconomic losses for which there is sufficient evidence*); and

2. Any economic (losses) (injuries) which the plaintiff has had or will probably have in the future, including: (*insert any recoverable economic losses for which there is sufficient evidence*).

**Notes on Use**

1. The amount of damages sought should not be stated in this instruction nor in the statement of the case. **Rodrigue v. Hausman**, 33 Colo. App. 305, 519 P.2d 1216 (1974).

2. Use whichever parenthesized words or phrases are appropriate.

3. Back pay damages are recoverable in a wrongful termination case. **Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.**, 232 P.3d 277, 283 (Colo. App. 2010) (back pay damages are "the amount the employee reasonably could have expected to earn absent the wrongful termination, reduced by either (a) the employee's actual earnings in an effort to mitigate damages or (b) the amount the employee failed to earn by not properly mitigating his or her damages").

4. Where there is sufficient evidence to justify an award of punitive damages, see Instruction 5:4.

5. If the affirmative defense of failure to mitigate damages has been

raised and there is evidence to support such defense, Instruction 31:8 should be given with this instruction. See **Bonidy**, 232 P.3d at 284 (employee's decision to start her own business did not automatically constitute a failure to mitigate or terminate the accrual of back pay damages).

### Source and Authority

This instruction is supported by **Genova v. Longs Peak Emergency Physicians, P.C.**, 72 P.3d 454 (Colo. App. 2003). See generally Francis M. Dougherty, Annotation, *Damages Recoverable for Wrongful Discharge of At-Will Employee*, 44 A.L.R.4th 1131 (1986).

**31:16 AFFIRMATIVE DEFENSE TO DAMAGES FOR  
PUBLIC-POLICY DISCHARGE CLAIM—  
AFTER-ACQUIRED EVIDENCE OF  
FRAUD OR OTHER MISCONDUCT**

If you find that the plaintiff, *(name)*, had actual damages, then you must consider whether the defendant, *(name)*, has proved (his) (her) affirmative defense of after-acquired evidence of (fraud) (misconduct). The plaintiff cannot recover any damages that occurred after the date that the defendant discovered evidence of (fraud) (misconduct) by the plaintiff. This affirmative defense is proved if you find all of the following:

1. The plaintiff *(describe type of misconduct, e.g., concealed or misrepresented a material fact or facts on a resume with the intent of creating a false impression in the mind of the defendant; committed theft; committed sexual harassment, etc.)*;
2. The defendant did not discover the (concealed or misrepresented fact or facts) (misconduct) until after the plaintiff was discharged; and
3. A reasonable, objective employer (would not have hired) (would have discharged) the plaintiff if it had discovered the (concealed or misrepresented fact or facts) (misconduct) at the time of the plaintiff's (fraud) (misconduct).

If you find that any one or more of these statements has not been proved, then you shall make no deduction from the plaintiff's damages.

On the other hand, if you find that all of these statements have been proved, then you must not award the plaintiff any damages occurring after the date that the defendant discovered evidence of the (fraud) (misconduct) by the plaintiff.

### Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate. In paragraph 1, describe the typed of misconduct alleged.

2. The issue of whether a reasonable, objective employer would have terminated an employee if it had known certain facts is generally for the trier of fact. However, if there is insufficient evidence to allow a reasonable fact finder to reach more than one conclusion from the evidence submitted, the question becomes one of law for the court. *See Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997).

### Source and Authority

1. This instruction is supported by **Weissman v. Crawford Rehabilitation Services, Inc.**, 914 P.2d 380 (Colo. App. 1995), *rev'd on other grounds*, 938 P.2d 540 (Colo. 1997). *See also McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995).

2. The court of appeals decision in **Weissman**, 914 P.2d at 386, extended the doctrine of after-acquired evidence of misconduct to misconduct that may have occurred after the commencement of the employment relationship. The supreme court's decision expressly did not reach that issue. **Crawford Rehab. Servs.**, 938 P.2d at 548.

3. The court of appeals decision in **Weissman**, 914 P.2d at 385, also extended the doctrine to claims of public-policy discharge, applying the United States Supreme Court's decision in **McKennon**, 513 U.S. at 362–63, and allowing after-acquired evidence to limit the type of relief available, although it cannot be relied upon to bar a public-policy discharge claim. The supreme court's decision reversed and remanded the public-policy discharge claim for failure to state a claim and, therefore, did not reach the issue. **Crawford Rehab. Servs.**, 938 P.2d at 553.

## **CHAPTER 32. PERSONAL PROPERTY**

### **A. CONVERSION**

32:1 Elements of Liability

32:2 Intentional and Substantial Interference—Defined

32:3 Damages

### **B. CIVIL THEFT**

32:4 Elements of Liability

32:5 Intentional and Knowingly—Defined

32:6 Damages—Actual

32:7 Damages—Statutory

## A. CONVERSION

### 32:1 ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of conversion of personal property, you must find that all of the following have been proved by a preponderance of the evidence:

1. The plaintiff, (*name*), (owned) (possessed) (had a right to possess) (a) (an) (*insert item of personal property*);

2. The defendant, (*name*), intentionally and substantially interfered with the plaintiff's (ownership of) (possession of) (right to possess) (*insert item of personal property*) by (taking possession of the [*insert item of personal property*]) (preventing the plaintiff from having access to the [*insert item of personal property*]) (destroying the [*insert item of personal property*]) (refusing to return the [*insert item of personal property*] after the plaintiff demanded its return) (exceeding the extent and duration of authorized use of the [*insert item of personal property*]); and

3. The plaintiff did not consent to the interference.

If you find that any one or more of these statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been

**proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. Use whichever parenthesized phrases are most appropriate.
2. Historically, interference with chattels was governed by writs at law for conversion, trespass to chattels, or replevin. The technical pleading distinctions of the writ system are now mostly irrelevant to the issues a jury must decide. The practical distinction between the three causes of action is in the remedy sought or awarded. In a conversion action, the allegation is that the defendant so substantially interfered with the property that the plaintiff is entitled to recover its market value at the time of the conversion. In a trespass action, the interference is less substantial and the plaintiff seeks damages for loss of use. In a replevin action, the plaintiff seeks return of the property (an equitable remedy) and damages for loss of use (a legal claim). If the property cannot be returned, the relief awarded in replevin is the full value of the property.
3. Instruction 32:2 (defining intentional and substantial interference) should be given with this instruction when the issue of intent or the extent of interference is disputed.

### Source and Authority

This instruction is supported by **Mason v. Farm Credit of Southern Colorado**, 2018 CO 46, ¶ 3, 419 P.3d 975, 978 (“Farm Credit alleged that Mason used or disposed of crops, farm products, and machinery that Farm Credit held as collateral without remitting the proceeds to Farm Credit”); **Itin v. Ungar**, 17 P.3d 129, 135 n.10 (Colo. 2000) (“Common-law conversion . . . is distinct from the crime of theft in that it does not require that a wrongdoer act with the specific intent to permanently deprive the owner of his property.”); **Maryland Casualty Co. v. Messina**, 874 P.2d 1058 (Colo. 1994) (quoting the elements of conversion claim from the RESTATEMENT (SECOND) OF TORTS § 222A (1965)); **Schmidt v. Cowen Transfer & Storage Co.**, 170 Colo. 550, 554, 463 P.2d 445, 447 (1970) (“demand is not essential where conversion is otherwise shown or where demand would be unavailing”); **Finance Corp. v King**, 150 Colo. 13, 370 P.2d 432, 435 (1962) (“where possession of the property has been lawfully acquired and the defendant has not asserted title to it nor dealt with it in a manner inconsistent

with the rights of the owner, there must be a demand and refusal before an action for conversion will lie"); **Byron v. York Investment Co.**, 133 Colo. 418, 424, 296 P.2d 742, 745 (1956) (a plaintiff must have "had a general or special property in the personalty converted, coupled with possession or the immediate right thereto"); **Herbertson v. Cohen**, 132 Colo. 231, 234, 287 P.2d 47, 48 (1955) (mortgagee under a valid chattel mortgage "had a sufficient title to maintain the [conversion] action"); **Knapp v. Hurd**, 100 Colo. 537, 68 P.2d 557 (1937) (no action for conversion lies because there was never a completed sale of automobile to plaintiff); **Dorris v. San Luis Valley Finance Co.**, 90 Colo. 209, 212, 7 P.2d 407, 409 (1932) ("Any evidence tending to deny plaintiff's ownership or right of possession [is] competent."); **McCormick v. First National Bank of Mead**, 88 Colo. 599, 602, 299 P. 7, 9 (1931) ("Even if the plaintiff in trover has title to, or a right of property in, a chattel, this will not alone support an action in trover. It must be united with actual possession or a right of immediate possession."); **Ferguson v. Turner**, 69 Colo. 504, 506-07, 194 P. 1103, 1103 (1921) ("An action in conversion lies where there has been an appropriation by an agent of the proceeds of a sale."); **Dutton Hotel Co. v. Fitzpatrick**, 69 Colo. 229, 231, 193 P. 549, 550 (1920) ("The remedy against a holder of a chattel under a lien is to tender satisfaction of the lien and demand possession. Upon refusal, which would amount to conversion, trover lies."); **Sigel-Campion Live Stock Commission Co. v. Holly**, 44 Colo. 580, 589, 101 P. 68, 72 (1909) ("If this exercise is not inconsistent with plaintiff's right or title, or if plaintiff consents or acquiesces therein, there is no conversion."); **Austin v. Van Loon**, 36 Colo. 196, 198, 85 P. 183, 184 (1906) ("A conversion, in the sense of the law of trover, consists either in the appropriation of a chattel by a party to his own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it to the exclusion or in defiance of the rights of the owner, or in withholding the possession from the owner under a claim of title inconsistent with the title of the latter."); **Beaman v. Stewart**, 34 Colo. 356, 358, 83 P. 629, 629 (1905) (actions "for the wrongful conversion of personalty, demand therefor prior to the commencement of suit is unnecessary, where the taking or seizure was wrongful in the first instance"); **Murphy v. Hobbs**, 8 Colo. 17, 30, 5 P. 637, 638 (1884) ("Any distinct act of dominion" is conversion "whether such wrongful dominion be exercised for the [trespasser's] own, or for another's, use."); **Omaha & Grant Smelting & Refining Co. v. Tabor**, 13 Colo. 41, 54-55, 21 P. 925, 930 (1889) ("A conversion is defined to be any act of the defendant inconsistent with the plaintiff's right of possession, or subversive of his right of property."); **Scott v. Scott**, 2018 COA 25, ¶¶ 31-33, 428 P.3d 626, 634 ("unlike civil theft, conversion does *not* require that the converter act with specific intent to permanently deprive the owner of his or her property"); **Former TCHR, LLC v. First Hand Management LLC**, 2012 COA 129, ¶ 38, 317 P.3d 1226, 1234 ("a secured party may bring a claim for conversion against a party who wrongfully obtained and sold property in which the secured party has a security interest, if the secured party's interest has priority"); **Stauffer v. Stegemann**, 165 P.3d 713, 717 (Colo. App. 2006) ("conversion is an intentional exercise of dominion or control over a chattel

which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel" (quoting RESTATEMENT § 222A(1)); **A-1 Auto Repair & Detail, Inc. v. Bilunas-Hardy**, 93 P.3d 598 (Colo. App. 2004) (conviction of criminal theft under section 18-4-401, C.R.S., may be preclusive in subsequent civil action for conversion); **Carder, Inc. v. Cash**, 97 P.3d 174, 184 (Colo. App. 2003) (defendant "failed to present evidence that it attempted to mitigate its damages by either investigating alternative uses for the equipment or by requesting permission to remove it"); **Underwood v. Dillon Companies, Inc.**, 936 P.2d 612 (Colo. App. 1997) (approving jury instructions that stated there could be no conversion if the plaintiff demanded return of property on conditions that varied from contract terms); **Montano v. Land Title Guarantee Co.**, 778 P.2d 328, 330 (Colo. App. 1989) ("the wrongful disposition of personal property by a bailee constitutes a conversion"); **Amber Properties, Ltd. v. Howard Electrical and Mechanical Co.**, 775 P.2d 43, 47 (Colo. App. 1988) ("the simple taking of another's property under an erroneous claim of right and over the protest of its possessor is insufficient to establish grounds for exemplary damages in a conversion action"); **Montgomery Ward & Co. v. Andrews**, 736 P.2d 40, 46 (Colo. App. 1987) ("Where there is a wrongful taking, the tort of conversion is complete upon that taking; the victim does not have to demand return of the goods nor does the wrongdoer have to refuse such a demand."); **Mari v. Wagner Equipment Co.**, 721 P.2d 1208 (Colo. App. 1986) (evidence sufficient to submit to a jury plaintiff's ownership of property and claim for conversion); **Glenn Arms Assocs. v. Century Mortgage & Inv. Corp.**, 680 P.2d 1315, 1317 (Colo. App. 1984) ("predicates to a successful claim for conversion are the owner's demand for return of property, and the controlling party's refusal to return it"); **Electrolux Corp. v. Lawson**, 654 P.2d 340, 342 (Colo. App. 1982) ("Electrolux [failed] to make demand [upon] Lawson to account for the allegedly converted property"); and **Pierce v. Ackerman**, 488 P.2d 1118, 1119 (Colo. App. 1971) ("It is elemental to the successful prosecution of a conversion action that the plaintiff establish his title or right of immediate possession to the property allegedly converted.") (not published pursuant to C.A.R. 35(f)).

## 32:2 INTENTIONAL AND SUBSTANTIAL INTERFERENCE—DEFINED

In determining whether the interference was intentional and so substantial that the defendant should be required to pay the full value of (*insert item of personal property*), the following factors may be considered:

1. The extent and duration of the defendant's possession or control;
2. The defendant's intent to assert a right inconsistent with the plaintiff's right of possession, control, or ownership;
3. Whether the defendant commingled the plaintiff's (*insert item of personal property*) with other property;
4. The extent and duration of the resulting interference with the plaintiff's right of possession, control, or ownership;
5. The harm done to (*insert item of personal property*); and
6. The inconvenience and expense caused to the plaintiff.

The defendant's act or omission may be intentional even if the defendant mistakenly believed (he) (she) (it) had a right to interfere with (*insert item of personal property*), or was unaware of the plaintiff's rights in (*insert item of personal property*).

### Notes on Use

This instruction should be given with Instruction 32:1 (elements of liability for conversion) when the issue of intent or the extent of interference is disputed.

### Source and Authority

1. This instruction is supported by *Maryland Casualty Co. v.*

**Messina**, 874 P.2d 1058 (Colo. 1994) (citing RESTATEMENT (SECOND) OF TORTS § 222A (1965)); **Rosenthal v. Whitehead**, 159 Colo. 565, 570, 413 P.2d 909, 912 (1966) (defendant had “no lawful right, title, or interest in the tractor” and was liable for conversion as a matter of law); **McCartney v. Foster**, 150 Colo. 537, 539, 374 P.2d 704, 705 (1962) (“there is no competent evidence that the property was wrongfully taken into [defendant’s] possession, nor was any demand made by McCartney for the return of the property”); **Davis v. American National Bank of Denver**, 149 Colo. 34, 37, 367 P.2d 325, 326 (1961) (“where possession of the property has been lawfully acquired and the defendant has not asserted title to it nor dealt with it in a manner inconsistent with the rights of the owner, there must be a demand and refusal before an action for conversion will lie”); **Schlittenhardt v. Bernasky**, 147 Colo. 601, 604, 364 P.2d 586, 587 (1961) (“Only in cases in which possession has been lawfully acquired in the first instance by the person who allegedly thereafter converts it to his own use, may the question of qualified refusal be submitted to the jury.”); **Colorado Kenworth Corp. v. Whitworth**, 144 Colo. 541, 548, 357 P.2d 626, 631 (Colo. 1960) (“for the purposes of an action for unlawful conversion, demand and refusal are never necessary, except to furnish evidence of the conversion, and when, without these, the circumstances are sufficient to prove the conversion, they are superfluous”); **Byron v. York Investment Co.**, 133 Colo. 418, 427, 296 P.2d 742, 746 (1956) (holding on the facts of the case that temporary exclusion of possession by owner did not constitute conversion: “a man may be compelled by threats, or even by physical coercion, to forego the full exercise of his own dominion as owner, yet if the wrongful act falls short of a disseisin of the property, the wrongdoer is not guilty of a conversion”); **Kranz v. Rubush**, 120 Colo. 264, 268, 209 P.2d 555, 557 (1949) (“a vendor who retakes his chattel on default of conditional sale is not liable in conversion for not tendering back the payment made on the purchase price”); **International Harvester Co. v. Lawrence Investment Co.**, 95 Colo. 523, 525, 37 P.2d 529, 530 (1934) (“an action for trover and conversion does not lie in Colorado at the instance of a mortgagor of chattels merely because the mortgagee has taken possession in compliance with the terms of the mortgage”); **Lutz v. Becker**, 89 Colo. 360, 364, 2 P.2d 1081, 1082 (1931) (“When one admittedly has in his possession goods and chattels belonging to another, something more than a mere offer to permit the owner to repossess himself of his own property is necessary, if he desires to avoid an action in conversion for damages.”); **Lininger Implement Co. v. Queen City Foundry Co.**, 73 Colo. 412, 216 P. 527 (1923) (no conversion could lie where defendant “always and persistently, so far as the evidence shows, recognized the plaintiff’s right to the beet pullers”); **Platt v. Walker**, 69 Colo. 584, 587, 196 P. 190, 191 (1921) (“It is immaterial in an action of conversion whether the property be converted innocently or knowingly. The gist of the action is the unauthorized appropriation of one’s property.”); **Worley v. Sancetta**, 540 P.2d 355, 357–58 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)) (“at the inception [defendant] had a right to [the property’s] possession . . . [therefore] a demand for the return of the property and refusal to comply therewith were prerequisites to [a right] to recover under a conversion

theory"); **Beneficial Finance Co. of Arvada v. Sullivan**, 534 P.2d 1226, 1228 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)) ("lists of customers, bakery routes, or laundry routes are not property subject to conversion"); **Aetna Casualty & Surety Co. v. Chisman**, 528 P.2d 1317, 1318 (Colo. App. 1974) (not published pursuant to C.A.R. 35(f)) ("because [defendant's] initial possession of the automobile was unauthorized, no demand for possession was necessary to perfect Aetna's claim for relief for conversion"); **Shockley v. Wigton**, 490 P.2d 77, 78 (Colo. App. 1971) (not published pursuant to C.A.R. 35(f)) (where plaintiff failed for two years to retrieve repaired car, held no conversion when defendant demanded "two years' storage on the automobile"); and **Deeb v. Canniff**, 29 Colo. App. 510, 488 P.2d 93, 96 (1971) (conversion exists as a matter of law where "a landlord evicted his tenant prior to termination of the lease, locked the tenant out, and refused to permit the tenant's chattels to be removed").

2. An interference that is less substantial and for which a plaintiff seeks only recovery of damages for loss of use may support a claim for trespass to chattels. See **Mountain States Tel. & Tel. Co. v. Horn Tower Constr. Co.**, 147 Colo. 166, 170, 363 P.2d 166, 177 (1961) ("Trespass to chattels is defined as the intentional interference with the possession, or physical condition of a chattel in the possession of another, without justification."); **Rifle Prod. Credit Ass'n v. Wagner**, 543 P.2d 91 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)).

## 32:3 DAMAGES

If you find in favor of the plaintiff, you shall award as (his) (her) (its) damages the full value of the *(insert item of personal property)* at the time of the interference.

### Notes on Use

1. A plaintiff may not receive the property and at the same time recover its full value. A plaintiff may not be compelled to receive the property in mitigation of damages, but if he does so, his recovery will be reduced accordingly.

2. If the plaintiff has recovered and is in possession of the property, the measure of damages is the difference in the value of the property before and after the interference, or the cost of repair minus any remaining diminution of value after the repair. *See* Instruction 6:12.

3. Special and consequential damages are not ordinarily awarded in conversion cases. *But see Rosen Novak Auto. Co. v. Hartog*, 168 Colo. 536, 538, 454 P.2d 932, 933 (1969) (affirming jury verdict for plaintiff in conversion action awarding special damages for “shock to their nerves and nervous system, great humiliation and embarrassment, loss or impairment of their credit, loss of use of their car, and loss of sleep and time”).

4. Where a jury concludes that property was converted, legal interest is allowed and should be awarded by the court from the time of conversion to the time of trial.

5. Exemplary damages may be awarded upon a proper showing. *Montgomery v. Tufford*, 165 Colo. 18, 437 P.2d 36 (1968).

### Source and Authority

This instruction is supported by *Mason v. Farm Credit of Southern Colorado*, 2018 CO 46, ¶ 29, 419 P.3d 975, 983 (“Actions for conversion often, if not always, seek money damages equivalent to the value of the personal property that was converted.”); *Masterson v. McCroskie*, 194 Colo. 460, 465, 573 P.2d 547, 551 (1978) (“Generally, the measure of damages for conversion is the value of the converted property at the time and place of the misappropriation plus legal interest from the time of the conversion to the time of trial.”); *Rosenthal v. Whitehead*, 171 Colo. 347, 348, 467 P.2d 831, 831 (1970) (the measure of damages was “the value of the tractor in question as of the time of conversion”); *Rosen Novak Auto Co. v. Hartog*, 168 Colo. 536, 454 P.2d 932 (1969) (jury verdict for plaintiff in conversion action awarded damages for emotional distress, humiliation and embarrassment,

impairment of credit, loss of use of car, and loss of sleep and time); **Montgomery**, 165 Colo. at 27, 437 P.2d at 41 ("one whose property is converted is entitled, as part of his damages, to interest at the legal rate from the time of the conversion on the amount found to be the value of the property converted"); **Gates Factory Store v. Coleman**, 142 Colo. 246, 249, 350 P.2d 559, 560 (1960) (jury verdict reversed because "there was no evidence offered as to the value of the tires taken at the time and place of their conversion," and "the value of the property taken, plus an additional amount equal to the legal rate of interest upon such value from the time of conversion to the time of the trial, is the proper measure of damages in trover and conversion actions"); **Colorado Kenworth Corp. v. Whitworth**, 144 Colo. 541, 357 P.2d 626 (Colo. 1960) (the mere taking of property under a claim of right over the protest of one in possession is not sufficient to establish grounds for exemplary damages in a conversion action); **Byron v. York Investment Co.**, 133 Colo. 418, 428, 296 P.2d 742, 747 (1956) ("The cost price of chattel must be related to the condition of the property at the time of the alleged conversion."); **Sigel-Campion Live Stock Commission Co. v. Holly**, 44 Colo. 580, 583, 101 P. 68, 70 (1909) ("in trover the measure of damages is the fair market value of the property converted at the time of conversion, and in this jurisdiction an additional amount equal to the legal rate of interest upon such value from the time of conversion to the time of trial"); **Omaha & Grant Smelting & Refining Co. v. Tabor**, 13 Colo. 41, 58, 21 P. 925, 931 (1889) ("The general rule in trover is that the damages should embrace the value of the property at the time of the conversion, with the interest up to the time of judgment."); **Murphy v. Hobbs**, 8 Colo. 17, 31, 5 P. 637, 638 (1884) ("appellant [is] answerable in this action for the value of the wagon when converted, less its value when recovered by appellee"); **Mercantile Financial Corp. v. Hamitt**, 680 P.2d 239, 241 (Colo. App. 1984) ("we conclude that Hamitt's refusal to pay rental thereafter . . . was tantamount to . . . a conversion of Mercantile's equipment [and] the appropriate measure of damages would be the fair market value of the property at the time the lease expired"); **Payne v. Russ Vento Chevrolet, Inc.**, 528 P.2d 935, 938-39 (Colo. App. 1974) (not published pursuant to C.A.R. 35(f)) ("a wrong doer cannot, after his conversion of property has become complete, lessen the actual damages recoverable by tendering back the property"); **Fair Bowl, Inc. v. Brunswick Corp.**, 502 P.2d 957, 958 (Colo. App. 1972) (not published pursuant to C.A.R. 35(f)) ("the proper measure of damages for the conversion of property is the value of that property at the time of conversion").

## B. CIVIL THEFT

### 32:4 ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of civil theft, you must find that all of the following have been proved by a preponderance of the evidence:

1. The plaintiff (owned) (possessed) (had an ownership interest in) the (*insert thing of value*);
2. The defendant knowingly (without authorization) (by threat) (by deception) (obtained) (retained) (exercised control over) the plaintiff's (*insert thing of value*); and
3. The defendant did so with the intent to permanently deprive the plaintiff of the use or benefit of the plaintiff's (*insert thing of value*).

If you find that any one or more of these (*number*) statements have not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. Paragraph 1 of this instruction requires the plaintiff to have a possessory or proprietary interest in a specific thing of value. § 18-4-401(1.5), C.R.S.; **Tisch v. Tisch**, 2019 COA 41, ¶ 52, 439 P.3d 89, 103 (“‘interest’ is a legal or equitable claim to or right in property”; “‘ownership’ implies the right to possess a thing, regardless of actual or constructive control”). However, a plaintiff’s status as a mere creditor of a debtor defendant, without more, does not establish a proprietary interest in any specific property. **People v. Rotello**, 754 P.2d 765, 767 (Colo. 1988) (the “county court correctly concluded that a mere debtor-creditor relationship was established in dismissing the four count information”).

2. Paragraph 3 of this instruction describes the most common conduct that satisfies the third element. There are four other ways in which the third element of theft may be proven. They are:

(a. The defendant knowingly used, concealed, or abandoned the plaintiff’s *[insert thing of value]* in such manner as to permanently deprive the plaintiff of the use or benefit of *[insert thing of value]*.)

(b. The defendant used, concealed, or abandoned the plaintiff’s *[insert thing of value]* intending that such use, concealment, or abandonment would permanently deprive the plaintiff of the use or benefit of the *[insert thing of value]*.)

(c. The defendant demanded *[describe the thing demanded]*, to which the defendant was not legally entitled as a condition of restoring *[insert thing of value]* to the plaintiff.)

(d. The defendant knowingly retained the plaintiff’s *[insert thing of value]* more than seventy-two hours after the agreed upon time for return in a lease or hire agreement.)

Any one or any combination of these five ways of proving theft may be considered by the jury where supported by the evidence. This instruction should be modified when supported by the evidence. If the jury is instructed to consider more than one circumstance, care must be taken to ensure that the jury understands that proof of any one of the five satisfies the third element of theft. The jury may also be instructed under Instruction 6:14 that damages may be awarded only once for the same loss.

3. This instruction should be modified in accordance with section 18-4-401(1), C.R.S., where there is evidence that the defendant knowingly pawned, pledged, or disposed of stolen property.

### Source and Authority

1. This instruction is supported by section 18-4-401; **Bermel v.**

**BlueRadios, Inc.**, 2019 CO 31, ¶ 31, 440 P.3d 1150, 1157 (“to recover on a claim for civil theft under section 18-4-405, a rightful owner of stolen property must establish the statutory elements of criminal theft, including the requisite culpable mental state”); **Van Rees v. Unleaded Software, Inc.**, 2016 CO 51, ¶ 23, 373 P.3d 603, 608 (“We therefore find that Van Rees’s complaint fails to allege the knowing deprivation of a thing of value.”); **Steward Software Co. v. Kopcho**, 266 P.3d 1085, 1086 (Colo. 2011) (concluding that “federal copyright law does not apply to a claim under Colorado law for civil theft of a work”); **Itin v. Ungar**, 17 P.3d 129, 133 (Colo. 2000) (“the General Assembly intended for this statute to require proof of the commission of a criminal act, but not proof of a prior conviction of the defendant as a condition for recovery of treble damages”); **Tisch**, 2019 COA 41, ¶ 65, 439 P.3d at 106 (“we conclude that whether the diverted profits constituted a distribution in which the Tisch siblings had a proprietary interest was a question for the jury”); **Franklin Drilling & Blasting Inc. v. Lawrence Construction Co.**, 2018 COA 59, ¶ 18, 463 P.3d 883, 887 (“To prove civil theft a plaintiff must prove that the defendant ‘knowingly obtains, retains, or exercises control over anything of value of another without authorization’ and must prove one of five alternative culpable mental states[.]”); **Scott v. Scott**, 2018 COA 25, ¶ 29, 428 P.3d 626, 634 (defendant’s “refusal to return the funds was simply based on her assertion that she was legally entitled to the funds as the named beneficiary under the policy; we do not view her conduct as articulating her intent to permanently deprive” the plaintiff of the proceeds); **Black v. Black**, 2018 COA 7, ¶ 95, 422 P.3d 592, 608 (“A finding of deception requires proof that the defendant made misrepresentations to the victim.”); **Huffman v. Westmoreland Coal Co.**, 205 P.3d 501, 510 (Colo. App. 2009) (concluding that “the stock options were not property and that plaintiff failed to present evidence that defendant intended to permanently deprive him of them”); **Rhino Fund, LLLP v. Hutchins**, 215 P.3d 1186, 1196 (Colo. App. 2008) (“Hutchins’s action in diverting the proceeds of the [nonperforming loans] for his own use also established the elements of civil theft”); **Becker & Tenenbaum v. Eagle Restaurant Co.**, 946 P.2d 600, 602 (Colo. App. 1997) (affirming civil theft judgment where “the funds represented by the check were disbursed to pay Eagle’s other creditors during the period the check was wrongfully withheld, and plaintiffs were, thus, deprived of the use or benefit of the value of the check by the withholding”); and **Cedar Lane Investments v. American Roofing Supply of Colorado Springs, Inc.**, 919 P.2d 879, 882 (Colo. App. 1996) (summary judgment properly granted in favor of Cedar Lane because it no longer had “possession of the money, having used it for matters relating to its business”).

2. The owner of stolen property who brings a civil action for theft must prove all elements of criminal theft by a preponderance of the evidence. **Dep’t of Nat. Res. v. 5 Star Feedlot, Inc.**, 2019 COA 162M, ¶ 14 (*cert. granted* Apr. 27, 2020).

3. A claim for civil theft is not barred by the economic loss rule. **Bermel**, 2019 CO 31, ¶ 43, 440 P.3d at 1159 (“we hold that the judge-

made economic loss rule cannot bar BlueRadios' statutory counterclaim for civil theft").

4. The intent to permanently deprive another of the use and benefit of his property may be inferred from the defendant's conduct and circumstances. **Huffman**, 205 P.3d at 509 ("The intent permanently to deprive the owner of the use or benefit of a thing of value may be inferred from the defendant's conduct and the circumstances of the case, but requires proof of a knowing use by the defendant inconsistent with the owner's permanent use and benefit.").

5. Defendant's ownership of the thing of value is a defense to the claim. **Steward Software Co.**, 266 P.3d at 1087 ("Because a person must commit theft of the property of *another*, ownership of the property at issue is a defense to civil theft.").

6. A claim for civil theft must be brought within two years after the "date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." **Black**, 2018 COA 7, ¶ 87, 422 P.3d at 607 (quoting § 13-80-108(1), C.R.S.).

**32:5 INTENTIONAL AND KNOWINGLY—DEFINED**

**A person acts with intent when (his) (her) conscious objective is to cause a specific result.**

**A person acts knowingly with respect to conduct or to a circumstance when (he) (she) is aware that (his) (her) conduct is of such nature or that such circumstance exists. A person acts knowingly with respect to a result of (his) (her) conduct when (he) (she) is aware that (his) (her) conduct is practically certain to cause the result.**

**Notes on Use**

This should be given with instruction 32:4.

**Source and Authority**

This instruction is supported by **Bermel v. BlueRadios, Inc.**, 2019 CO 31, ¶ 31, 440 P.3d 1150, 1157 (“to recover on a claim for civil theft under section 18-4-405, a rightful owner of stolen property must establish the statutory elements of criminal theft, including the requisite culpable mental state”); section 18-1-501(5), C.R.S. (“A person acts ‘intentionally’ or ‘with intent’ when his conscious objective is to cause the specific result proscribed by the statute defining the offense.”); and section 18-1-501(6), C.R.S. (“A person acts ‘knowingly’ or ‘willfully’ with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts ‘knowingly’ or ‘willfully’ with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.”).

## 32:6 DAMAGES—ACTUAL

The plaintiff has the burden of proving by a preponderance of the evidence the nature and extent of (his) (her) (its) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the defendant's theft.

In determining such damages, you shall consider the following:

1. Any economic losses which the plaintiff had or will probably have in the future, including *(insert recoverable economic losses, e.g., the value of lost property, for which there is sufficient evidence)*; and

2. Any noneconomic losses or injuries which the plaintiff has had or will have in the future, including *(insert recoverable noneconomic losses, e.g., pain and suffering, emotional distress, and inconvenience, for which there is sufficient evidence)*.

### Notes on Use

1. If the jury awards actual damages, the amount should be trebled by the court after the jury verdict in the final judgment. § 18-4-405, C.R.S.; **Tisch v. Tisch**, 2019 COA 41, ¶ 1, 439 P.3d 89.

2. Plaintiffs awarded actual or statutory damages are entitled to reasonable attorney's fees in addition to actual or statutory damages, to be awarded by the court after the verdict.

### Source and Authority

1. This instruction is supported by **Gorsich v. Double B Trading Co.**, 893 P.2d 1357, 1363 (Colo. App. 1994) (“‘Actual damages’ include non-economic damages as well as economic damages”; approving jury instruction allowing jury to consider pain and suffering, inconvenience, and emotional distress.).

2. The treble damages component of section 18-4-405 is a statutory penalty subject to C.R.C.P. 98's requirement that the action be tried in the county where the claim arose. **Ehrlich Feedlot, Inc. v. Oldenburg**, 140 P.3d 265, 270 (Colo. App. 2006) (“We therefore conclude the treble damages provision of section 18-4-405 imposes a statutory penalty governed by C.R.C.P. 98.”).

3. Prejudgment interest should not be awarded on the treble damages portion of a judgment. **Becker & Tenenbaum v. Eagle Rest. Co.**, 946 P.2d 600, 603 (Colo. App. 1997) (“treble damages portion of the award was not properly subject to prejudgment interest”).

4. “[I]f attorney fees and costs are a component of damages for a statutory claim, a judgment for damages on such a claim is not appealable until the amount of the attorney fees and costs has been set.” **Chavez v. Chavez**, 2020 COA 70, ¶ 28, 465 P.3d 133 (quoting **Hall v. Am. Standard Ins. Co.**, 2012 COA 201, ¶ 14, 292 P.3d 1196, 1200).

**32:7 DAMAGES—STATUTORY**

If you find in favor of the plaintiff, but do not award any actual damages, you shall award the plaintiff statutory damages in the amount of \$200.

**Notes on Use**

None.

**Source and Authority**

This instruction is supported by section 18-4-405, C.R.S.

## **CHAPTER 33. RESERVED FOR FUTURE USE**

## CHAPTER 34. WILLS

- 34:1 WILL CONTEST—STATEMENT OF THE CASE
- 34:2 Elements of Proof of Properly Executed, Signed, and Witnessed or Acknowledged Will—All Wills Except Self-Proved and Holographic
- 34:3 Conscious Presence—Defined
- 34:4 Witness Having an Interest Under the Will
- 34:5 Elements of Proof of Properly Executed Will—Self-Proved Will
- 34:6 Elements of Proof of Properly Executed Will—Holographic Will
- 34:7 Testamentary Intent—Defined
- 34:8 Revocation by Burning, Tearing, Cancelling, Obliterating, or Destroying—Defined
- 34:9 Presumption of Revocation of Lost Will or of Will or Part(s) of Will Found Burned, Torn, Cancelled, Obliterated, or Destroyed
- 34:10 Burden of Proof on Issues of Sound Mind and Memory (Testamentary Capacity) and Undue Influence
- 34:11 Testamentary Capacity and Sound Mind—Defined
- 34:12 Insane Delusion—Defined
- 34:13 Effect of Attestation of Will by Witnesses
- 34:14 Undue Influence—Defined
- 34:15 Factors to be Considered in Determining Undue Influence
- 34:16 Undue Influence—Presumption When Beneficiary in a Confidential or Fiduciary Relationship
- 34:17 Undue Influence—Permissible Inference When Presumption of Undue Influence Is Rebutted
- 34:18 Confidential Relationship—Defined
- 34:19 Fiduciary Relationship—Defined
- 34:20 Verdict Form for Proponent
- 34:21 Verdict Form for Contestant

### 34:1 WILL CONTEST—STATEMENT OF THE CASE

(I) (The Court) will now instruct you as to the claims of each party to the case and the law governing the case. Please pay close attention to these instructions. You must all agree on your verdict. You must apply the law to the facts.

The parties to the case are:

The proponent, (*name*), who is the party offering the will for probate, and the contestant, (*name*), who is the party objecting to the admission of the will to probate.

(The proponent claims the offered will was properly signed by [*name of alleged testator*] as [his] [her] [signed and witnessed] [signed and acknowledged] [self-proved] [or] [holographic] will.)

(Even though the court has determined that the offered will was not properly signed by [*name of alleged testator*], the court has also determined that it should nonetheless be treated as if it had been properly signed as [his] [her] [signed and witnessed] [signed and acknowledged] [or] [holographic] will.)

The contestant claims that the will should not be admitted to probate because:

*(insert the basis of the objection).*

These are the issues you are to determine, but are not to be considered by you as evidence in the case.

#### Notes on Use

1. Use the first unnumbered parenthesized paragraph unless the court has determined as a matter of law under section 15-11-503(1), C.R.S., that the offered document or writing “was not executed in compliance with section 15-11-502.” Use the second unnumbered parenthesized paragraph if a valid will exists under section 15-11-503, when the evidence is not sufficient for a reasonable jury to find by a preponderance of the evidence that the will was properly executed as a signed and witnessed will under section 15-11-502(1), C.R.S., or as a holographic will under section 15-11-502(2). Under section 15-11-503, even though “a document, or writing added upon a document, was not executed in compliance with section 15-11-502,” the document or writing may still be treated as if it had been so executed if the court (not a jury) determines (1) that “the document [was] signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent’s spouse,” § 15-11-503(2), and (2) that “the proponent of the document or writing [has established] by clear and

convincing evidence that the decedent intended the document or writing to constitute: (a) The decedent's will; (b) A partial or completed revocation of the will; (c) An addition to or an alteration of the will; or (d) A partial or complete revival of the decedent's formerly revoked will or a formerly revoked portion of the will," § 15-11-503(1). See **In re Estate of Wiltfong**, 148 P.3d 465 (Colo. App. 2006) (a document acknowledged but not signed may be recognized as a will under this statute); **In re Estate of Sky Dancer**, 13 P.3d 1231 (Colo. App. 2000) (inadequate basis to find a will under this statute).

2. Use whichever other parenthesized or bracketed portions of the instruction are appropriate to the evidence in the case.

3. If the parties have stipulated pursuant to C.R.C.P. 48 to having the jury's verdict based on some stated majority rather than requiring it to be unanimous, this instruction must be appropriately modified.

4. If the contest relates only to a codicil or to a will with one or more codicils, appropriate modifications should be made in this instruction.

5. If the will contains an *in terrorem* (no contest) clause, courts generally will not enforce that clause when a beneficiary acts in good faith and has probable cause to challenge the will. **In re Estate of Peppler**, 971 P.2d 694 (Colo. App. 1998). "In the context of wills, probable cause is 'the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful.'" *Id.* at 697; accord RESTATEMENT (SECOND) OF PROPERTY § 9.1 cmt. j (1981). Additionally, no-contest clauses in wills are to be strictly construed, and forfeiture is to be avoided if possible. **Sandstead-Corona v. Sandstead**, 2018 CO 26, ¶ 60, 415 P.3d 310. The court must first determine as a matter of law if the *in terrorem* (no contest) clause is enforceable; if it is not, then the case may be submitted to the jury.

### Source and Authority

1. This instruction is supported by sections 15-12-407 (contested cases), 15-10-306 (right to jury trial), and 15-11-502 to -504, C.R.S.

2. The requirements of a properly executed, signed, and witnessed or acknowledged will, that is, a will other than a self-proved or holographic will, are set out in Instruction 34:2. The requirements of a properly executed self-proved will are set out in Instruction 34:5, and the requirements for a properly executed holographic will are set out in Instruction 34:6.

**34:2 ELEMENTS OF PROOF OF PROPERLY  
EXECUTED, SIGNED, AND WITNESSED  
OR ACKNOWLEDGED WILL—ALL WILLS  
EXCEPT SELF-PROVED AND  
HOLOGRAPHIC**

For the proponent, (*name*), to have the writing that has been admitted into evidence and identified as (*insert appropriate description*) admitted to probate as the will of the testator, (*insert name of alleged testator*), you must find the following have been proved by a preponderance of the evidence:

1. The writing (*insert appropriate description*) was signed by (*name of alleged testator*) (or) (someone for [*name of alleged testator*]) in (his) (her) conscious presence and at (his) (her) direction; and

(2. Either before or after the testator's death, the writing was signed by at least two persons, each of whom signed it within a reasonable time after [either]:

[a. Seeing [*name of alleged testator*] sign the writing] [or]

[b. Seeing [*name of alleged testator*] acknowledge the signature on the writing as being (his) (hers)] [or]

[c. Seeing [*name of alleged testator*] acknowledge the writing as being (his) (her) will].)

(3. The writing was acknowledged by the testator before [a notary public] [an individual authorized by law to take acknowledgements].)

If you find that either one of these propositions has not been proved by a preponderance of the evidence, then your verdict must be for the contestant, (*name*).

On the other hand, if you find that both proposi-

tions have been proved, (then your verdict must be for the proponent) (then you must consider the contestant's claim[s] that *[insert an appropriate description of any of the contestant's claims on which the contestant has the burden of proof, e.g., "that (name of alleged testator) was not of sound mind at the time he signed the will"]*).

If you find that (this claim has) (any one or more of these claims have) been proved by a preponderance of the evidence, then your verdict must be for the contestant.

However, if you find that (this claim has not) (none of these claims have) been proved, then your verdict must be for the proponent.

#### Notes on Use

1. This instruction should be used in cases in which there is sufficient evidence for a reasonable jury to find by a preponderance of the evidence that the alleged will was properly executed as a signed and witnessed will under section 15-11-502(1), C.R.S.

2. Use either numbered paragraph 2 or numbered paragraph 3, as appropriate, with numbered paragraph 1.

3. If the evidence is not sufficient for a reasonable jury to find by a preponderance of the evidence that the will was properly executed as a signed and witnessed will or a signed and acknowledged will under section 15-11-502(1), or as a holographic will under section 15-11-502(2), the provisions of section 15-11-503, C.R.S. may nonetheless be applicable. Under that statute, even though "a document, or writing added upon a document, was not executed in compliance with section 15-11-502," the document or writing may still be treated as if it had been so executed if the court (not a jury) determines (1) that "the document [was] signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse," § 15-11-503(2), and (2) that "the proponent of the document or writing [has established] by clear and convincing evidence that the decedent intended the document or writing to constitute: (a) The decedent's will; (b) A partial or completed revocation of the will; (c) An addition to or an alteration of the will; or (d) A partial or complete revival of the decedent's formerly revoked will or a formerly revoked portion of the will," § 15-11-503(1). *See In re Estate of Wiltfong*, 148 P.3d 465 (Colo. App. 2006) (a document acknowledged but not signed may be recognized as a will under this statute); *In re Estate of Sky Dancer*,

13 P.3d 1231 (Colo. App. 2000) (inadequate basis to find a will under this statute).

4. For self-proved wills, see Instruction 34:5.

5. If the writing is one that would, at the most, constitute a holographic will, then Instruction 34:6 should be used rather than this instruction.

6. Instruction 34:3, defining “conscious presence,” should be given with this instruction whenever that phrase is given in numbered paragraph 1 of this instruction.

7. Use whichever parenthesized and bracketed words and phrases are appropriate to the evidence in the case. In particular, omit the second parenthesized clause in the third to the last paragraph and the last two paragraphs if the contestant has made no claim of invalidity based on those matters on which the contestant has the burden of proof (e.g., “lack of testamentary intent or capacity [insufficient age or unsound mind], undue influence, fraud, duress, mistake, or revocation,” section 15-12-407, C.R.S.) or there is insufficient evidence to support a jury finding as to any such matters.

8. If the death of the testator is in issue, and the proponent of the will in question has the burden of proving death under section 15-12-407, this instruction must be appropriately modified.

9. This instruction must be appropriately modified if, because the testator’s original will, if any, has been lost, destroyed, or is otherwise unavailable, no writing has been admitted, or the writing referred to in this instruction is a copy. Under section 15-12-402(3), C.R.S., the burden is on the proponent to prove that a lost, destroyed, or otherwise unavailable will was not revoked. Consequently, where the will has been lost, destroyed, or for any other reason is unavailable, this instruction must be modified to add as an element of the proponent’s claim the requirement that the proponent prove “the will had not been revoked by [*name of alleged testator*].” See Instruction 34:8 and the accompanying Notes on Use. Instructions 34:8 and 34:9 should also be given if appropriate to the case.

10. Section 15-12-402(3) refers to satisfying “the court” that an “unavailable” will has not been revoked. However, section 15-10-306(1), C.R.S., appears to permit the issue to be tried to a jury.

11. If a will has not been destroyed and is, therefore, still “available,” but is found burned, torn, canceled, or obliterated, then the burden of proving revocation is with the contestant under section 15-12-407. The issue should be set out as the contestant’s claim in the third to the last unnumbered paragraph of this instruction, and Instruction 34:8 and 34:9 should also be given. Also, contrary to prior case law, *see, e.g.,*

**Hoff v. Armbruster**, 122 Colo. 563, 226 P.2d 312 (1950), the fact that the will at the time of the testator's death is found burned, torn, or obliterated (but not "destroyed") no longer creates a presumption of an intent to revoke that shifts the burden of proving the contrary to the proponent. That fact, however, still creates a presumption that shifts the burden of going forward with the evidence. *See* Instruction 34:9.

12. This instruction should not be used when it is claimed only a part, as opposed to the entire will, is invalid because of fraud, etc.

13. Omit any of the numbered paragraphs if the facts are not in dispute, and make such other changes as are necessary in such circumstances. *See O'Brien v. Wallace*, 145 Colo. 291, 359 P.2d 1029 (1961) (where proof of due execution has been made, only such issues on which there is contrary evidence should be submitted to the jury).

14. This instruction, appropriately modified as may be necessary, may also be used in cases involving a written foreign will which the proponent claims was executed in compliance "with section 15-11-502 or 15-11-503 or . . . with the law at the time of execution of the place where the will [was] executed, or of the law of the place where, at the time of execution or at the time of death, the testator [was] domiciled, [had] a place of abode, or [was] a national." § 15-11-506, C.R.S.

15. For international wills, see the Uniform International Wills Act, §§ 15-11-1001 to -1011, C.R.S. When the valid execution of a will under that statute requires one or more facts to be determined by a jury, this instruction, appropriately modified, may be used. Other relevant instructions in this chapter, with such modifications as may be necessary, may also be used.

16. As to determining the sufficiency of the evidence relating to the requirements of due execution under this instruction, see section 15-12-406(1):

(1) In a contested case in which the proper execution of a will is at issue, the following rules apply:

- (a) If the will is self-proved pursuant to section 15-11-504, the will satisfies the requirements for execution without the testimony of any attesting witness, upon filing the will and the acknowledgement and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgement or affidavit.
- (b) If the will is notarized pursuant to section 15-11-502(1)(c)(II), but not self-proved, there is a rebuttable presumption that the will satisfies the requirements for execution upon filing the will.

- (c) If the will is witnessed pursuant to section 15-11-502(1)(c)(I), but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this state, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred.

For submitting rebuttable presumptions to the jury, see Instruction 3:5.

17. When the case involves a “separate writing or memorandum identifying [a] devise of certain types of tangible personal property” permitted under section 15-11-513, C.R.S., this instruction should be appropriately modified, if necessary, to make it clear to the jury that the requirements of this instruction apply only to the will itself and not to the “separate writing.”

18. If the contest relates only to a codicil or to a will with one or more codicils, appropriate modifications must also be made in this instruction.

19. When necessary and appropriate to the evidence in the case, Instruction 34:4 (witness having an interest under the will) should be given with this instruction as a cautionary instruction.

20. “Intent that [a] document constitute[s] the testator’s will can be established by extrinsic evidence. . . .” § 15-11-502(3).

21. Where a holographic will was executed in accordance with the requirements of section 15-11-502(2), and the signature of the decedent was affixed to the will itself, an additional signature beside cross-outs intended to work a partial revocation was not necessary pursuant to sections 15-11-503 or 15-11-507, C.R.S. **In re Estate of Schumacher**, 253 P.3d 1280 (Colo. App. 2011).

### Source and Authority

This instruction is supported by section 15-11-502(1).

**34:3 CONSCIOUS PRESENCE—DEFINED**

**“Conscious” means that the testator, (*name*), was aware through one or more of (his) (her) senses of the presence of the person signing the will at (his) (her) direction. “Presence” requires that that person was physically near the testator, though not necessarily in (his) (her) line of sight.**

**Notes on Use**

This instruction should be given in conjunction with Instruction 34:2 whenever the phrase “conscious presence” is used in numbered paragraph 1 of that Instruction.

**Source and Authority**

The first sentence of this instruction is supported by the common definition of conscious. The second sentence is supported by section 15-11-502(4), C.R.S.

**34:4 WITNESS HAVING AN INTEREST UNDER THE WILL**

**A will or any provision in it may be valid even if a person who signed the will as a witness is also a beneficiary under the will.**

**Notes on Use**

When, in light of the evidence and arguments being made in the case, it would be appropriate to give this instruction as a cautionary instruction, it may be given with Instruction 34:2, 34:5, or 34:6.

**Source and Authority**

This instruction is supported by section 15-11-505(1), C.R.S., which provides that anyone who is “generally competent to be a witness may act as a witness to a will.” Under subsection (2) of that statute, the “signing of a will by an interested witness does not invalidate the will or any provision of it.”

## 34:5 ELEMENTS OF PROOF OF PROPERLY EXECUTED WILL—SELF-PROVED WILL

**Exhibit** (*insert appropriate identification*) **is what is known as a “self-proved” will. It has been offered by the proponent, (name), as the will of (name of alleged testator).**

**If you find that the contestant has proven (the claim of) (any one or more of the claims of) (*insert an appropriate description of any of the contestant’s claims on which the contestant has the burden of proof and of which there is sufficient evidence, e.g., “the will was not properly executed because [name of alleged testator] did not sign it himself, nor was it signed by another at his direction,” “[name of alleged testator] was not of sound mind at the time he signed the will,” etc.*), by a preponderance of the evidence, your verdict must be for the contestant, (name).**

**On the other hand, if you find that the contestant has not proven (the claim of) (any one or more of the claims of) (*insert an appropriate description of any of the contestant’s claims on which the contestant has the burden of proof and of which there is sufficient evidence, e.g., “the will was not properly executed because [name of alleged testator] did not sign it himself, nor was it signed by another at his direction,” “[name of alleged testator] was not of sound mind at the time he signed the will,” etc.*), your verdict must be for the proponent.**

### Notes on Use

1. If the court determines as a preliminary evidentiary matter that the offered will does not meet the requirements of a self-proved will under section 15-11-504, C.R.S., the will may nonetheless be entitled to probate as a regularly executed or foreign will, in which case Instruction 34:2 should be used rather than this instruction. Similarly, should it appear “the material provisions” or that “material portions” of the offered will were handwritten by the testator, the will may be entitled to probate as a holographic will. § 15-11-502(2), C.R.S.; see Instruction 34:6.

2. As with other wills, a self-proved will may be invalid because of

“lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation,” but the burden of proving such matters is on the contestant. § 15-12-407, C.R.S.

3. Under section 15-11-504(3), relating to the making of a self-proved will, “[a] signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will if necessary to prove the will’s due execution.”

4. In all cases involving a self-proved will, section 15-12-406(1)(a), C.R.S., provides:

If the will is self-proved pursuant to section 15-11-504, the will satisfies the requirements for execution without the testimony of any attesting witness, upon filing the will and the acknowledgement and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgement or affidavit.

5. The conclusive presumption of due execution of a self-proved will created by the acknowledgment of the testator and affidavits of witnesses to “an attested will” does not apply if there “is evidence of fraud or forgery affecting the acknowledgment or affidavit.” Section 15-12-406(1)(a). Although section 15-12-406(1)(a) is not explicit, it is assumed the burden of proving such fraud or forgery is on the contestant. C.R.C.P. 8(c). If there is sufficient evidence of such fraud or forgery, this instruction must be appropriately modified.

6. Also, while the acknowledgment of the testator or the affidavits of the witnesses may be invalid because of fraud or forgery, the “attested will” may itself have been validly executed, for example, at an earlier time. Likewise, it is possible that, at an earlier time, the will had been validly executed as a holographic will. If there is sufficient evidence supporting such conflicting claims, the basic provisions of this instruction should be combined in an appropriate manner with the basic provisions of either Instruction 34:2 or Instruction 34:6.

7. For cases that do not involve evidence of fraud or forgery, the statutory presumption is conclusive. Consequently, neither CRE 301 nor Instruction 3:5 applies to this instruction. When there is sufficient rebutting evidence of a ground that would invalidate the execution of the will, that ground should be appropriately described in the second paragraph of the instruction.

8. This instruction should not be used when it is claimed only a part, as opposed to the entire will, is invalid because of fraud, etc.

9. If the contest relates only to a codicil or to a will with one or more codicils, appropriate modifications should be made in this instruction.

10. Such other instructions in this chapter which are appropriate to the particular case should be given with this instruction.

11. This instruction may not be used for a lost will, even though the lost will would otherwise have qualified as a self-proved will. The presumption of valid execution requires filing of the will and the acknowledgment and affidavits annexed or affixed to it.

### Source and Authority

This instruction is supported by sections 15-11-504, 15-12-406(1)(a), and 15-12-407.

### 34:6 ELEMENTS OF PROOF OF PROPERLY EXECUTED WILL—HOLOGRAPHIC WILL

For the proponent, *(name)*, to have the writing that has been admitted into evidence and identified as *(insert appropriate description)* admitted to probate as the holographic will of the testator, *(insert name of alleged testator)*, you must find the following have been proved by a preponderance of the evidence:

1. The writing *(insert appropriate description)*, whether witnessed or not, was signed by the testator, *(name)*, in (his) (her) own handwriting; and

2. Material portions of the writing were handwritten by the testator.

If you find that either proposition 1 or 2 has not been proved by a preponderance of the evidence, then your verdict must be for the contestant, *(name)*.

On the other hand, if you find that both propositions 1 and 2 have been proved, (then your verdict must be for the proponent) (then you must consider the contestant's claim[s] that *[insert an appropriate description of any of the contestant's claims on which the contestant has the burden of proof, e.g., "that (name of alleged testator) was not of sound mind at the time he signed the will"]*).

If you find that (this claim has) (any one or more of these claims have) been proved by a preponderance of the evidence, then your verdict must be for the contestant.

However, if you find that (this claim has not) (none of these claims have) been proved, then your verdict must be for the proponent.

#### Notes on Use

1. This instruction should be used in cases in which there is suf-

ficient evidence for a reasonable jury to find by a preponderance of the evidence that the alleged will was properly executed as a holographic will under section 15-11-502(2), C.R.S.

2. The provisions of section 15-11-503, C.R.S., may apply if the evidence is not sufficient for a reasonable jury to find by a preponderance of the evidence that the will was properly executed either as a signed and witnessed will under section 15-11-502(1)(c)(I), or as a holographic will under section 15-11-502(2). Under section 15-11-503, even though “a document, or writing added upon a document, was not executed in compliance with section 15-11-502,” the document or writing may still be treated as if it had been so executed if the court (not a jury) determines (1) that “the document [was] signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent’s spouse,” § 15-11-503(2), and (2) that “the proponent of the document or writing [has established] by clear and convincing evidence that the decedent intended the document or writing to constitute: (a) The decedent’s will; (b) A partial or completed revocation of the will; (c) An addition to or an alteration of the will; or (d) A partial or complete revival of the decedent’s formerly revoked will or a formerly revoked portion of the will,” § 15-11-503(1). *See also In re Estate of Wiltfong*, 148 P.3d 465 (Colo. App. 2006) (a document acknowledged but not signed may be recognized as a will under this statute); *In re Estate of Sky Dancer*, 13 P.3d 1231 (Colo. App. 2000) (inadequate basis to find a will under this statute).

3. Use whichever parenthesized words are appropriate to the evidence in the case. In particular, omit the second parenthesized clause in the third to the last paragraph and the last two paragraphs if the contestant has made no claim of invalidity based on those matters on which the contestant has the burden of proof (for example, “lack of testamentary intent or capacity [insufficient age or unsound mind], undue influence, fraud, duress, mistake, or revocation,” § 15-12-407, C.R.S.), or there is insufficient evidence to support a jury finding as to any such matters.

4. If the death of the testator is in issue, and the proponent of the will in question has the burden of proving death under section 15-12-407, this instruction must be appropriately modified.

5. This instruction must be appropriately modified if, because the testator’s original will, if any, has been lost, destroyed, or is otherwise unavailable, no writing has been admitted, or the writing referred to in this instruction is a copy. For additional modifications that may also need to be made in this instruction when the will has been lost, destroyed, or is otherwise unavailable, see the discussion following in these Notes on Use.

6. This instruction should not be used when it is claimed only a part, as opposed to the entire will, is invalid because of fraud, etc.

7. Omit either numbered paragraph 1 or 2 if the facts are not in dispute, and make such other changes as are necessary in such circumstances. See **O'Brien v. Wallace**, 145 Colo. 291, 359 P.2d 1029 (1961) (where proof of due execution has been made, only such issues on which there is contrary evidence should be submitted to the jury).

8. This instruction may be used, when appropriately modified, in cases involving a written foreign holographic will which the proponent claims was executed in compliance “with section 15-11-502 or 15-11-503 or . . . the law at the time of execution of the place where the will [was] executed, or of the law of the place where, at the time of execution or at the time of death, the testator [was] domiciled, [had] a place of abode, or [was] a national.” § 15-11-506, C.R.S.

9. When the case involves a separate writing identifying a devise of certain types of tangible personal property permitted under section 15-11-513, C.R.S., this instruction should be appropriately modified, if necessary, to make it clear to the jury that the requirements of this instruction apply only to the will itself and not to the “separate writing.”

10. If the contest relates only to a codicil or to a will with one or more codicils, appropriate modifications must also be made in this instruction.

11. When necessary and appropriate to the evidence in the case, Instruction 34:4 (witness having an interest under the will) should be given with this instruction as a cautionary instruction.

12. This instruction must be appropriately modified if, because the testator's original will, if any, has been lost, destroyed, or is otherwise unavailable, no writing has been admitted, or the writing referred to in this instruction is a copy. Under section 15-12-402(3), C.R.S., the burden of proving that a lost, destroyed, or otherwise unavailable will was not revoked is on the proponent. Consequently, where the will has been lost, destroyed, or for any other reason is unavailable, this instruction must be modified to add as an element of the proponent's claim the requirement that the proponent prove “the will had not been revoked by [name of alleged testator].” See Instruction 34:8 and the accompanying Notes on Use. Instructions 34:8 and 34:9 should also be given if appropriate to the case.

13. Section 15-12-402(3), refers to satisfying “the court” that an “unavailable” will has not been revoked. However, section 15-10-306(1), C.R.S., appears to permit the issue to be tried to a jury.

14. If a will has not been destroyed and is, therefore, still “available,” but is found burned, torn, canceled, or obliterated, then the burden of proving revocation is with the contestant under section 15-12-407. The issue should be set out as the contestant's claim in the third to the last unnumbered paragraph of this instruction, and Instruction 34:8

and 34:9 should also be given. Also, contrary to prior case law, *see, e.g., Hoff v. Armbruster*, 122 Colo. 563, 226 P.2d 312 (1950), the fact that the will at the time of the testator's death is found burned, torn, or obliterated (but not "destroyed") no longer creates a presumption of an intent to revoke that shifts the burden of proving the contrary to the proponent. That fact, however, still creates a presumption that shifts the burden of going forward with the evidence. *See* Instruction 34:9.

15. There need be no witnesses to holographic wills. § 15-11-502(2).

16. A holographic will may be valid even though immaterial parts such as date or introductory wording are printed or stamped. The fact that immaterial portions of a holographic will (for example, date of execution) may be illegible or difficult to read does not justify denying the admission of an otherwise admissible holographic will to probate. Moreover, as to material portions which may be difficult to read, "it is the court's duty to ascertain and give effect to the testator's intent." *Nunez v. Jersin*, 635 P.2d 231, 233 (Colo. App. 1981).

17. For a writing to constitute a holographic will, the "instrument must have been executed . . . with testamentary intent, [that is, t]he writing, together with such extrinsic evidence as may be admissible, must establish that the decedent intended the writing itself to make a testamentary disposition of decedent's property." *In re Estate of Olschansky*, 735 P.2d 927, 929 (Colo. App. 1987).

18. "[T]he intent of the testator and not the location of his [signed] name is the crucial factor in determining whether a holographic will has been signed within the meaning of" the statute. *In re Estate of Fegley*, 42 Colo. App. 47, 48, 589 P.2d 80, 81 (1978).

19. The "[i]ntent that [a] document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting." § 15-11-502(3).

20. Under a previous version of the Probate Code, "the material provisions" of the offered will must have been in the handwriting of the testator. *See* Ch. 451, sec. 1, § 153-2-503, 1973 Colo. Sess. Laws 1555-56. Under the present version, § 15-11-502(2), the word "provisions" was changed to "portions" and the "the" before "provisions" was deleted. *See* Ch. 178, sec. 3, § 15-11-502(2), 1994 Colo. Sess. Laws 997. The relevant language now, therefore, is "and material portions of the document are in the testator's handwriting." § 15-11-502(2). The omission of the "the" before "portions" suggests that a holographic will is sufficient as long as some material portions are in the handwriting of the testator. The use of the word "the" before "provisions" in the original language suggested that all material "provisions" had to be in the testator's handwriting. Also, the change in language from "provisions" to "portions" suggests that some change in meaning, however slight, was intended. However,

none of the comments prepared by the Joint Editorial Board of the ABA and the National Conference of Commissioners on Uniform State Laws for the Uniform Probate Code indicate what changes in legal effect, if any, these changes in language were intended to make. See UNIF. PROBATE CODE § 2-502(b) cmt. (amended 2010).

### Source and Authority

1. The two numbered paragraphs of this instruction are supported by section 15-11-502(2).

2. This instruction is also based on section 15-12-407, which provides that “[p]roponents of a will have the burden of establishing prima facie proof of due execution in all cases. . . .” Under section 13-25-127(1), C.R.S., the weight of the proponent’s burden of proof as to the issues covered by numbered paragraphs 1 and 2 is by a preponderance of the evidence.

## 34:7 TESTAMENTARY INTENT—DEFINED

Testamentary intent means the intent to direct how some or all of one's property is to be disposed of after one's death. A person need not express that intent by stating that a writing is his or her will. The intent may be shown by other words or acts.

### Notes on Use

1. Because the burden of proving lack of testamentary intent is on the contestant, section 15-12-407, C.R.S., this instruction should only be used in conjunction with Instruction 34:2, 34:5, or 34:6, when the contestant has raised lack of testamentary intent as an affirmative defense. See **In re Estate of Grobman**, 635 P.2d 231 (Colo. App. 1981) (burden of proving lack of testamentary intent on the contestant of holographic will).

2. Modification in the language of this instruction may be required or advisable in cases involving (1) powers of appointment and other similar interests (2) codicils (3) related testamentary documents or instruments, for example, a separate writing identifying a bequest of tangible property permitted under section 15-11-513, C.R.S. See, e.g., **In re Estate of Harrington**, 850 P.2d 158 (Colo. App. 1993) (although decedent had necessary testamentary intent, she intended that her "writings" operate as tangible personal property memoranda under section 15-11-513, rather than as a codicil to her will).

### Source and Authority

1. This instruction is supported by sections 15-12-407, and 15-11-502(3), C.R.S.

2. It is also based on the following cases, which, though they were decided prior to the statutory change shifting the burden of proving the lack of testamentary intent to the contestant, would appear to be applicable: **In re Estate of Maikka**, 110 Colo. 433, 134 P.2d 723 (1942) (testator's clear indication that instrument is the testator's last will and testament is sufficient, and testator may authorize or ratify another's request that witnesses act as such); and **Aquilini v. Chamblin**, 94 Colo. 367, 30 P.2d 325 (1934) (A testator need not use exact words of statute in publishing a will; words, signs, motions, or conduct clearly indicating the instrument is his last will and testament are sufficient).

3. "The term testamentary intent can only mean that the testator's frame of mind or intent is that the instrument or disposition of property which he makes shall pass no interest in the property until his death and that the act or instrument shall take effect only upon his death." 1 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 5.6, at 178 (rev. ed.

(2003).

TESTAMENTARY INTENT—DEFINITION

Testamentary intent means the intent to dispose of how some or all of one's property is to be disposed of after one's death. A person need not express that intent by stating that a writing is his or her will. The intent may be shown by other words or acts.

Notes on Use

1. Because the burden of proving lack of testamentary intent is on the contestant, section 15-12-407, C.R.S., this instruction should only be used in conjunction with instruction 34-2, 34-6, or 34-8, when the contestant has raised lack of testamentary intent as an affirmative defense. See *In re Estate of Gorman*, 835 P.2d 231 (Colo. App., 1991) (burden of proving lack of testamentary intent on the contestant of holographic will).

2. Modification in the language of this instruction may be required or advisable in cases involving (1) powers of appointment and other similar interests (2) codicil (3) related testamentary documents or instruments, for example, a separate writing identifying a request of tangible property permitted under section 15-11-513, C.R.S. See e.g., *In re Estate of Harrington*, 880 P.2d 153 (Colo. App., 1993) (although decedent had necessary testamentary intent, she intended that her "writings" operate as tangible personal property memoranda under section 15-11-513, rather than as a codicil to her will).

Source and Authority

1. This instruction is supported by sections 15-12-407 and 15-11-502(3), C.R.S.

2. It is also based on the following cases, which, though they were decided prior to the statutory change shifting the burden of proving the lack of testamentary intent to the contestant, would appear to be applicable: *In re Estate of Mathis*, 110 Colo. 433, 134 P.2d 723 (1943) (testator's clear indication that instrument is the testator's last will and testament is sufficient, and testator may authorize a third party to request that witnesses act as such); and *Agulini v. Chumblin*, 94 Colo. 387, 30 P.2d 325 (1934) (a testator need not use exact words of statute in publishing a will; words, signs, motions, or conduct clearly indicating the instrument is his last will and testament are sufficient).

3. The term testamentary intent can only mean that the testator's frame of mind or intent is that the instrument or disposition of property which he makes shall pass no interest in the property until his death, and that the act or instrument shall take effect only upon his death. 1 W. Paine & T. Parker, *Pact on the Law of Wills* § 5.6, at 178 (rev. ed.

### **34:8 REVOCATION BY BURNING, TEARING, CANCELLING, OBLITERATING, OR DESTROYING—DEFINED**

A person who has made a will may revoke (that will) (or) (any part of that will) by performing an act of revocation on the will with the intent to revoke (it) (or) (part of it). A person may also revoke a will by directing another person to perform an act of revocation if that other person performs the act of revocation in the conscious presence of the one who made the will.

An act of revocation on (a will) (or) (any part of a will) includes burning, tearing, canceling, obliterating, or destroying the (will) (or) (part of the will). For a burning, tearing, or canceling to be an act of revocation on the will, it is not necessary that the burn, tear, or cancellation have touched any of the words on the will.

("Conscious" means that the one who made the will was aware through one or more of [his] [her] senses that the act of revocation was being performed by the other person. "Presence" requires that the other person was physically near the one who made the will, though not necessarily within [his] [her] line of sight.)

#### **Notes on Use**

1. This instruction should be given when appropriate to the evidence in the case.

2. Omit any portions of this instruction, whether parenthesized or not, which are not relevant to, or supported by, the evidence in the case.

3. When appropriate to the evidence, Instruction 34:9 (presumption of revocation) should also be given with this instruction.

4. There are two ways to revoke a will or any part thereof: (1) executing a subsequent will that revokes the previous will or part expressly or by inconsistency, or (2) by performing a revocatory act on the will. § 15-11-507(1), C.R.S.; *In re Estate of Schumacher*, 253 P.3d 1280,

1282 (Colo. App. 2011) (“A will can be revoked only in the manner provided by statute, and the statutory provisions for revocation of wills must be strictly construed.”). Under section 15-11-507(1)(b), a “revocatory act on the will” includes “burning, tearing, canceling, obliterating, or destroying the will or any part of it.” Prior to the 1979 amendment to section 15-12-402(3), C.R.S., the burden of proving revocation was on the contestant in all cases. *See* Ch. 152, sec. 8, § 15-12-402, 1979 Colo. Sess. Laws 649. However, under the 1979 amendment to section 15-12-402(3), the burden of proving that a lost, destroyed, or otherwise unavailable will was not revoked is on the proponent. Consequently, where the will has been lost, destroyed, or for any other reason is unavailable, Instruction 34:2 (for all but self-proved and holographic wills) or 34:6 (for holographic wills) must be modified to add as an element of the proponent’s claim the requirement that the proponent prove “the will had not been revoked by [name of alleged testator].” The effect of this modification will be to place the burden of proving no revocation on the proponent, as required by the 1979 amendment.

5. On the other hand, if the will has not been destroyed and is, therefore, still “available,” but is found burned, torn, canceled or obliterated, then the burden of proving revocation remains on the contestant, and that question of fact should be set out as a contestant’s claim in the third to the last unnumbered paragraph of Instruction 34:2 or 34:6, whichever is appropriate. Also, contrary to prior case law, *see, e.g., Hoff v. Armbruster*, 122 Colo. 563, 226 P.2d 312 (1950), the fact that the will at the time of the testator’s death is found burned, torn or obliterated (but not “destroyed”) no longer creates a presumption of an intent to revoke that shifts the burden of proving the contrary to the proponent. That fact, however, still creates a presumption that shifts the burden of going forward with the evidence. *See* Instruction 34:9.

6. If other rules relating to revocation would be relevant in light of the evidence in the case and would require the resolution of one or more disputed facts by the jury, an appropriate instruction must be given. *See, e.g.,* § 15-11-507(1)(a) (revocation by execution of subsequent will); § 15-11-508, C.R.S. (revocation by change of circumstances); § 15-11-509, C.R.S. (revival of revoked will).

7. “Although a will does not become operable until the testator’s death . . . the effectiveness of [acts causing a] revocation is dependent on the law in force,” governing such acts at the time of the acts. *In re Estate of Ralston*, 674 P.2d 1001, 1003 (Colo. App. 1983).

8. Direct evidence that the decedent himself made the cross-outs in a will is not always required. *In re Estate of Schumacher*, 253 P.3d at 1283–84 (lawyer’s testimony that decedent showed him a will with the cross-outs and explained the reason for the cross-outs adequate to support conclusion decedent himself made the cross-outs).

9. Doctrines such as the presumptive revocation of a will when a

trust is revoked, equity, and mistake do not supersede statutory authority regarding will revocation. **In re Estate of Sandstead**, 2016 COA 49, ¶ 71, 412 P.3d 799, *rev'd on other grounds sub nom. Sandstead-Corona v. Sandstead*, 2018 CO 26, 415 P.3d 310; see **In re Estate of Schumacher**, 253 P.3d at 1282; **In re Estate of Haurin**, 43 Colo. App. 296, 605 P.2d 65 (1979).

### Source and Authority

1. The first and second paragraphs of this instruction are supported by the provisions of section 15-11-507(1)(b).

2. For the third paragraph, see the Source and Authority to Instruction 34:3 (defining conscious presence).

**34:9 PRESUMPTION OF REVOCATION OF LOST  
WILL OR OF WILL OR PART(S) OF WILL  
FOUND BURNED, TORN, CANCELLED,  
OBLITERATED, OR DESTROYED**

**“Presumptions” are rules based upon experience or public policy and established in the law to help the jury decide the case.**

**If you find by a preponderance of the evidence that the will of *(name of alleged testator)* was last in (his) (her) possession, and after (his) (her) death (the will could not be found) ([the will] [or] [any one or more parts of the will] was found burned, torn, canceled, obliterated, or destroyed), then the law presumes (, and you must find,) that *(name of alleged testator)* revoked (the will) (one or more parts of the will).**

**(You must consider this presumption together with all the other evidence in the case to determine whether *[name of alleged testator]* revoked [the will] [or] [one or more parts of the will]).**

**(If you find this presumption applies, you must determine, from all the evidence, whether *[name of alleged testator]* intended to revoke the entire will or only one or more parts of the will.)**

**Notes on Use**

1. Use whichever parenthesized and bracketed words and phrases are appropriate to the evidence in the case. Also, omit the parenthesized last paragraph if, based on the evidence in the case, a reasonable jury could only find that the will had been lost, or could only find (a) that the entire will had been revoked by burning, etc. or (b) that a part or parts of it had been so revoked.

2. This instruction should not be given unless there is sufficient evidence from which a reasonable jury could reasonably find the basic facts of the presumption, for example, possession by the testator, etc., to be proved.

3. See the Notes on Use to Instruction 3:5 (permissible inference arising from rebuttable presumption). As explained there, if there is ev-

idence to support the basic facts of the presumption, but there is no or insufficient evidence rebutting the presumed fact, then the parenthesized clause, “and you must find,” in the second paragraph must be given and the parenthesized third paragraph must be omitted. On the other hand, if there is sufficient rebutting evidence (and assuming the presumption covered by this instruction is one that stays in the case as “some evidence,” even when rebutted, see the Notes on Use to Instruction 3:5), the parenthesized clause, “and you must find,” should be omitted, and the parenthesized third paragraph must be given.

4. Under both CRE 301, and section 15-12-407, C.R.S., the presumption set out in this instruction does not shift the burden of disproving the presumed fact to the opponent of the presumption. For a discussion of CRE 301, see Notes 1-7 of the Notes on Use to Instruction 3:5. Under section 15-12-407, a party has “the ultimate burden of persuasion as to matters with respect to which [that party has] the initial burden of proof.”

5. A decedent does not need to have had exclusive possession of the torn or canceled will for this presumption to apply. **In re Estate of Schumacher**, 253 P.3d 1280 (Colo. App. 2011) (will was in decedent's possession when it was found in a box of personal records decedent sent to his secretary to store in her garage six months before his death).

6. “[A] testator’s cancellation of a duplicate original or fully executed carbon copy of a will which is in the testator’s possession at his death raises a presumption that the testator intended to cancel the other duplicate original or the original will in the possession of another. . . . [Such] presumption, as other evidentiary presumptions, may be rebutted by evidence.” **In re Estate of Tong**, 619 P.2d 91, 92 (Colo. App. 1980). When the evidence is sufficient to support the application of this rule, this instruction must be appropriately modified.

### Source and Authority

This instruction is supported by section 15-11-507(1)(b), C.R.S.; **Hoff v. Armbruster**, 122 Colo. 563, 568, 226 P.2d 312, 314 (1950) (“Where a will which cannot be found following the death of the testator is shown to have been in his possession when last seen, the presumption is, in the absence of other evidence, that he destroyed it *animo revocandi*.” (quoting 57 Am. Jur. *Wills* § 549)); and 3 W. BOWE & D. PARKER, *PAGE ON THE LAW OF WILLS* § 29.139 (presumption where will is missing) and § 29.140 (presumption where will is torn, canceled) (rev. ed. 2004). See also **In re Estate of Perry**, 33 P.3d 1235 (Colo. App. 2001).

### **34:10 BURDEN OF PROOF ON ISSUES OF SOUND MIND AND MEMORY (TESTAMENTARY CAPACITY) AND UNDUE INFLUENCE**

**No separate instruction to be given.**

#### **Note**

Instructions 34:11 and 34:14, when applicable, and the last paragraphs of Instructions 34:2, 34:5, and 34:6, when applicable, adequately inform the jury of the burden of proof with regard to the affirmative defenses of lack of testamentary capacity or the existence of undue influence.

### 34:11 TESTAMENTARY CAPACITY AND SOUND MIND—DEFINED

A will that was signed when the person making the will did not have testamentary capacity is not valid and may not be admitted to probate. (*Name of alleged testator*) did not have testamentary capacity if (he) (she) (was not eighteen years of age or older) (or) (was not of sound mind) when the will was signed.

(A person is not of sound mind if, when signing a will, [(he) (she) was suffering from an insane delusion that affected or influenced (his) (her) decisions regarding property included in the will] [or] [the person does not understand all of the following:

1. That (he) (she) is making a will;
2. The nature and extent of the property (he) (she) owns;
3. How that property will be distributed under the will;
4. That the will distributes the property as (he) (she) wishes; and
5. Those persons who would normally receive (his) (her) property.])

#### Notes on Use

1. When the issue of lack of testamentary capacity has been properly put in issue, this instruction should be given in conjunction with Instruction 34:2, 34:5, or 34:6.

2. Use whichever parenthesized and bracketed portions of the instruction are appropriate in light of the evidence in the case.

3. For the definition of “insane delusion,” see Instruction 34:12. *See also In re Estate of Gallavan*, 89 P.3d 521 (Colo. App. 2004).

4. An objector to a will may challenge a testator’s capacity based on either or both tests for “sound mind” set out in this instruction and in

Instruction 34:12. **In re Estate of Breeden**, 992 P.2d 1167 (Colo. 2000) (discussing both tests).

5. For a discussion as to the specific knowledge a testator must have to be deemed to know the “nature and extent” of his or her property, see **In re Estate of Romero**, 126 P.3d 228 (Colo. App. 2005).

### Source and Authority

1. This instruction is supported by section 15-11-501, C.R.S. (to have testamentary capacity the testator must have been of sound mind and eighteen years of age or more).

2. The definition of “sound mind” is based on **Cunningham v. Stender**, 127 Colo. 293, 255 P.2d 977 (1953), and reaffirmed in **In re Estate of Breeden**, 992 P.2d at 1170; **In re Estate of Romero**, 126 P.3d at 230–31; and **In re Estate of Scott**, 119 P.3d 511 (Colo. App. 2004), *aff’d on other grounds sub nom. Scott v. Scott*, 136 P.3d 892 (Colo. 2006). See also **In re Estate of Gallavan**, 89 P.3d 521 (Colo. App. 2004).

3. The burden of proving lack of testamentary capacity is on the contestant. § 15-12-407, C.R.S.

**34:12 INSANE DELUSION—DEFINED**

**An insane delusion is a persistent belief, resulting from illness or disorder, in the existence or non-existence of something that is contrary to all evidence.**

**Notes on Use**

1. When appropriate to the evidence, this instruction should be used in conjunction with Instruction 34:11.

2. A will is not invalid even though the testator suffered from insane delusions at the time of executing the will if these insane delusions did not materially affect or influence the disposition of property set forth in the will. **In re Estate of Breeden**, 992 P.2d 1167 (Colo. 2000).

**Source and Authority**

This instruction is supported by **In re Estate of Breeden**, 992 P.2d 1170–71; and **In re Estate of Romero**, 126 P.3d 228 (Colo. App. 2005). *See also* **In re Estate of McCrone**, 106 Colo. 69, 101 P.2d 25 (1940) (an adjudication of mental incompetency is evidence of lack of a sound mind and memory but is not conclusive evidence of incapacity); **In re Estate of Cole**, 75 Colo. 264, 226 P. 143 (1924).

**34:13 EFFECT OF ATTESTATION OF WILL BY  
WITNESSES**

**No separate instruction to be given.**

**Note**

In most if not all instances, an instruction on this subject would be an improper comment on the evidence.

**34:14 UNDUE INFLUENCE—DEFINED**

**Undue influence means words or conduct, or both, which, at the time of the making of a will:**

- 1. Deprived the person making the will of (his) (her) free choice; and**
- 2. Caused the person making the will to make it or part of it differently than (he) (she) otherwise would have.**

**Notes on Use**

1. Use whichever parenthesized words are most appropriate.
2. This instruction should be given in conjunction with Instruction 34:2, 34:5, or 34:6, whenever it is claimed (and there is sufficient supporting evidence) that the entire will or codicil is invalid because it was executed in its entirety while the testator was under undue influence. This instruction may also be used when only a part of the will is claimed to be invalid because of undue influence.
3. When this instruction is given, Instruction 34:15 (factors to be considered in determining undue influence) must also be given, and either Instruction 34:16 (presumption of undue influence when beneficiary in a confidential or fiduciary relationship) or Instruction 34:17 (inference of undue influence, when presumption of undue influence is rebutted) may be appropriate.
4. The burden of proof on the issue of undue influence is on the contestant. § 15-12-407, C.R.S.

**Source and Authority**

This instruction is supported by T. ATKINSON, WILLS § 55 (2d ed. 1953). See also **Scott v. Leonard**, 117 Colo. 54, 184 P.2d 138 (1947) (no undue influence found); **Snodgrass v. Smith**, 42 Colo. 60, 94 P. 312 (1908) (possible to have partially valid will); **In re Estate of Shell**, 28 Colo. 167, 63 P. 413 (1900) (no undue influence found).

### 34:15 FACTORS TO BE CONSIDERED IN DETERMINING UNDUE INFLUENCE

Undue influence cannot be inferred solely because one or more persons may have had a motive or an opportunity to influence (*name of alleged testator*) in the making of (his) (her) will.

Influence gained by reason of love, affection or kindness, or by appeals to such feelings, is not undue influence.

You may consider the provisions in the will in determining whether or not (*name of alleged testator*) was acting under undue influence at the time (he) (she) made the (claimed) will. However, in considering any particular provisions in the (claimed) will, you must consider them along with all the other provisions in the will and along with all other evidence relating to the making of the will.

A person (18 years or older and) (of sound mind and) not acting under undue influence may will his or her property to whomever he or she desires. The fact that a will may contain provisions that differ from your idea of what would be proper is not enough to invalidate the will for undue influence.

#### Notes on Use

1. This cautionary instruction should be given with Instruction 34:14 when undue influence is in issue. Either Instruction 34:16 (presumption of undue influence when beneficiary in a confidential or fiduciary relationship) or Instruction 34:17 (inference of undue influence, when presumption of undue influence is rebutted) may also be appropriate.

2. The second paragraph should be omitted if there is no evidence in the case relating to the matters covered by it.

3. Omit the parenthesized word “claimed” if the only dispute going to the validity of the will is undue influence.

4. Because the burden of proving lack of testamentary capacity is

on the contestant, § 15-12-407, C.R.S., the parenthetical references to testamentary capacity (age and sound mind) in the last paragraph should not be given unless either or both these matters have, in addition to undue influence, been properly put in issue by the contestant. Their inclusion otherwise in this instruction might improperly confuse the jury by suggesting the proponent has the burden of proving those elements of testamentary capacity.

### Source and Authority

This instruction is supported by **Scott v. Leonard**, 117 Colo. 54, 184 P.2d 138 (1947) (states the rule set out in the first paragraph); **In re Estate of Rentfro**, 102 Colo. 400, 79 P.2d 1042 (1938) (mere kindness of treatment, or reasonable solicitation, entreaty or persuasion not sufficient to invalidate a will); **Lamborn v. Kirkpatrick**, 97 Colo. 421, 50 P.2d 542 (1935) (if proponent and testator were living in unlawful cohabitation, proponent must show such relationship was not used to influence the will); **Aquilini v. Chamblin**, 94 Colo. 367, 30 P.2d 325 (1934) (supports the second and fourth paragraphs); **Piggott v. Schachet**, 76 Colo. 434, 232 P. 1112 (1925) (states the rule set out in the first paragraph); **Davis v. Davis**, 64 Colo. 62, 170 P. 208 (1917) (supports the fourth paragraph); **Lehman v. Lindenmeyer**, 48 Colo. 305, 109 P. 956 (1909) (same); **Snodgrass v. Smith**, 42 Colo. 60, 94 P. 312 (1908) (the burden of showing undue influence is on the one who asserts it, and an opportunity to exert undue influence in itself creates no presumption of undue influence); **In re Estate of Shell**, 28 Colo. 167, 63 P. 413 (1900) (states the rules set out in the first and fourth paragraphs); and **Blackman v. Edsall**, 17 Colo. App. 429, 68 P. 790 (1902) (supports the second paragraph and lists other matters for jury to consider).

### 34:16 UNDUE INFLUENCE—PRESUMPTION WHEN BENEFICIARY IN A CONFIDENTIAL OR FIDUCIARY RELATIONSHIP

[Deleted.]

#### Note

1. This former instruction is incorrect under **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009), and should not be given. In **Krueger**, the Supreme Court held that the rebuttable presumption of undue influence due to a confidential or fiduciary relationship “shifts only the burden of going forward with evidence, and does not shift the entire burden of proof.” *Id.* at 1154. The former instruction’s notes on use stated that the instruction was to be “given only if there is no or insufficient evidence rebutting the presumed fact of undue influence.” **Krueger** states, however, that “[a]fter a rebuttable presumption is raised and the burden of going forward is shifted, if the opponent does not meet her burden, the presumption establishes the presumed facts as a matter of law.” *Id.* at 1156.

2. In that event, the proper procedure would be either to direct a verdict in whole or in part or to instruct the jury that the fact of undue influence has been established as a matter of law. *See* Instruction 2:5 (directed verdict). No jury issue as to the presumed fact would remain. *See also* Notes on Use to Instruction 3:5 (permissible inference arising from rebuttable presumption).

3. **Krueger** is consistent with CRE 301 (discussed in the Notes on Use to Instruction 3:5) and the provisions of the Probate Code, which now clearly establish that the presumption shifts to the proponent only the burden of coming forward with rebutting evidence. The presumption does not shift to the proponent the “ultimate” burden of disproving undue influence. § 15-12-407, C.R.S. “Contestants . . . have the burden of establishing . . . undue influence. . . . Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof.” *Id.*; *see also* §§ 15-17-101(1), (2)(b), C.R.S. (applicability of Probate Code to events occurring prior to its adoption); **In re Estate of Schlagel**, 89 P.3d 419 (Colo. App. 2003) (any presumption of undue influence arising out of confidential relationship did not shift burden of proof to proponent of will, but only burden of coming forward with evidence rebutting claim of undue influence, and ultimate burden of proof remained with contestants of will).

4. The opponent of the presumption may meet the burden of rebutting the presumption by producing evidence of the circumstances of the relationship and the transaction, such as evidence of love and trust between the parties, evidence the transaction was not unreasonable, and evidence of opportunity for independent action by the testator. *See In re Estate of Schlagel*, 89 P.3d at 422 (evidence of trust between par-

ties to transaction and that beneficiary never made demands for property); **Arnold v. Abernathy**, 134 Colo. 573, 307 P.2d 1106 (1957) (evidence transaction was fair and reasonable), *overruled by Krueger*, 205 P.3d at 1155; **In re Estate of Romero**, 126 P.3d 228 (Colo. App. 2005) (testator living independent of beneficiary and with access to others at time will executed).

5. “[W]hether the opponent’s evidence meets the burden is a question of legal sufficiency for the trial court, not a question of fact for the jury.” **Krueger**, 205 P.3d at 1154. If the opponent of the presumption meets the burden, “the presumption does not continue in the case.” *Id.* at 1156. Nonetheless, a permissible inference of the presumed fact of undue influence remains. *Id.* “Whether the trial court instructs a jury on the permissible inference is within its discretion.” *Id.* at 1158. If the trial court decides to instruct on the permissible inference, use instruction 34:17. Note, however, that the Supreme Court “disfavor[s] instructions emphasizing specific evidence.” *Id.* at 1157. **Krueger** sets forth a detailed framework for a trial court to use in deciding whether to instruct on the permissible inference. *Id.* at 1157–58.

**34:17 UNDUE INFLUENCE—PERMISSIBLE  
INFERENCE WHEN PRESUMPTION OF  
UNDUE INFLUENCE IS REBUTTED**

You may, but are not required to, draw an inference that the will was signed under undue influence if you find by a preponderance of the evidence that *(name of beneficiary claimed to have been in a confidential or fiduciary relationship)*

1. Was a beneficiary under the will, and
2. Was in a (confidential) (and) (or) (fiduciary) relationship with *(name of testator)* at the time of the preparation or execution of the will, and
3. Was in some way actively involved with the preparation or signing of the will.

If you draw this inference, you may consider it together with all other evidence in the case in determining whether or not *[name of testator]* signed the will under undue influence.

You should not draw an inference, however, that a person exercised undue influence over another person solely because they were in a (confidential) (and) (or) (fiduciary) relationship.

**Notes on Use**

1. This instruction may be used only when the trial court rules that the opponent of the presumption of undue influence has produced legally sufficient evidence to rebut the presumption. See **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009); Notes on Use to Instruction 34:16. In that event, the presumption does not continue in the case. **Krueger**, 205 P.3d at 1156. If the jury finds all of the facts in paragraphs 1 through 3 of the instruction, however, the jury still may draw an inference of undue influence. *Id.* The trial court has discretion whether to instruct on this permissible inference. *Id.* at 1156–57.

2. For a definition of “inference,” see Instruction 3:8.

3. Though instructions emphasizing specific evidence are disfavored, policy considerations may permit the trial court in its discretion to

instruct the jury on an inference of undue influence and unfairness in transactions between persons in fiduciary or confidential relationships. **Krueger**, 205 P.3d at 1157; see Notes on Use to Instructions 3:8 and 34:16. When the case involves an elderly person making a significant conveyance to a caretaker, there are strong reasons for using this instruction. **Krueger**, 205 P.3d at 1157–58. Nonetheless, the Supreme Court in **Krueger** upheld the trial court's decision not to instruct. *Id.* at 1158.

### Source and Authority

This instruction is supported by **Krueger**, 205 P.3d at 1156. See also Notes on Use to Instructions 3:8 and 34:16.

**34:18 CONFIDENTIAL RELATIONSHIP—DEFINED**

A confidential relationship exists whenever one person gains the trust and confidence of the other person by acting or pretending to act for the benefit of or in the interest of the other (and, as a result, is put in a position to exercise influence and control over the other).

**Notes on Use**

1. When appropriate, this instruction should be used with Instructions 34:16 and 34:17 and such other instructions, as for example, Instruction 19:5 (duty to disclose), when a definition of “confidential relationship” is required. When this instruction is used with Instructions 34:16 and 34:17, the parenthesized last clause should be included. When it is used with other instructions, such as Instruction 19:5, the parenthesized last clause should be omitted.

2. When instructing a jury on a claim for breach of a fiduciary duty arising out of a confidential relationship, Instructions 26:3 and 26:4 should be used, rather than this instruction.

**Source and Authority**

1. This instruction is supported by RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (1959). *See also* **Page v. Clark**, 197 Colo. 306, 592 P.2d 792 (1979); **Arnold v. Abernethy**, 134 Colo. 573, 307 P.2d 1106 (1957), *overruled on other grounds by* **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009); **Hilliard v. Shellabarger**, 120 Colo. 441, 210 P.2d 441 (1949), *overruled on other grounds by* **Krueger**, 205 P.3d at 1155; **Dittbrenner v. Myerson**, 114 Colo. 448, 167 P.2d 15 (1946); **Nicholson v. Ash**, 800 P.2d 1352 (Colo. App. 1990); **First Nat’l Bank of Meeker v. Theos**, 794 P.2d 1055 (Colo. App. 1990); **Rubenstein v. South Denver Nat’l Bank**, 762 P.2d 755 (Colo. App. 1988); **Alexander Co. v. Packard**, 754 P.2d 780 (Colo. App. 1988); **Meyer v. Schwartz**, 638 P.2d 821 (Colo. App. 1981).

2. A confidential relationship may arise when one person occupies a position of superiority over another with the opportunity to use that superiority to the other’s disadvantage. **United Fire & Cas. Co. v. Nissan Motor Corp.**, 164 Colo. 42, 433 P.2d 769 (1967). Further, a confidential relationship may arise if: (1) one party has taken steps to induce another to believe that he or she can safely rely on the first party’s judgment or advice; (2) one person has gained the confidence of the other and purports to act or advise with the other’s interest in mind; or (3) the parties’ relationship is such that one is induced to relax the care and vigilance that one would ordinarily exercise in dealing with a stranger. **Theos**, 794 P.2d at 1061; *accord* **In re Marriage of**

**Page**, 70 P.3d 579 (Colo. App. 2003). Generally, to establish the existence of a confidential relationship, plaintiff must show that he or she reposed a special trust or confidence in the defendant, that reposing such trust in the defendant was justified, and that the defendant either invited or ostensibly accepted the plaintiff's trust. **Steiger v. Burroughs**, 878 P.2d 131 (Colo. App. 1994).

3. If a confidential relationship is shown to exist, the person in whom the special trust is placed must act in good faith and with due regard for the interests of the one reposing the confidence. **Nicholson**, 800 P.2d at 1355.

4. There is no separate and distinct cause of action for a breach of a confidential relationship per se. **Bock v. Brody**, 870 P.2d 530 (Colo. App. 1993), *aff'd in part, rev'd in part on other grounds*, 897 P.2d 769 (Colo. 1995); **Todd Holding Co. v. Super Valu Stores, Inc.**, 874 P.2d 402 (Colo. App. 1993). Rather, the existence of a confidential relationship is simply one of the elements to be considered in determining whether there is fraud, undue influence, overreaching, or other improper conduct. **Theos**, 794 P.2d at 1061; *see also* **Jarnagin v. Busby, Inc.**, 867 P.2d 63 (Colo. App. 1993).

**34:19 FIDUCIARY RELATIONSHIP—DEFINED**

**See Instructions 26:2 and 26:3.**

**34:20 VERDICT FORM FOR PROPONENT**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Action No. \_\_\_\_\_**

**IN THE MATTER OF        )  
THE ESTATE OF         )  
                                  )  
\_\_\_\_\_,                    )  
Deceased.                )**     **VERDICT**

**We, the jury, find in favor of the proponent, (*name*).**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ **Foreperson** \_\_\_\_\_  
\_\_\_\_\_

**Notes on Use**

1. See Notes 4 and 5 of the Notes on Use to Instruction 4:4.
2. This instruction uses the statutory language of the Probate Code. *See, e.g.*, § 15-12-407, C.R.S. In appropriate cases, for example, when more than one instrument is in controversy, a special verdict form may be used or special interrogatories may be submitted to the jury with this instruction pursuant to C.R.C.P. 49.

**Source and Authority**

This instruction is supported by section 15-12-407. *See also Irwin v. Robinson*, 143 Colo. 336, 355 P.2d 108 (1960), noting that the caption on this form is the proper caption to be used in a case involving a contest over the probate of a will.

**34:21 VERDICT FORM FOR CONTESTANT**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Action No. \_\_\_\_\_**

**IN THE MATTER OF )  
THE ESTATE OF )  
\_\_\_\_\_, ) **VERDICT**  
Deceased. )**

**We, the jury, find in favor of the contestant, (*name*).**

\_\_\_\_\_  
**Foreperson**  
\_\_\_\_\_  
\_\_\_\_\_

**Notes on Use**

See the Notes on Use to Instruction 34:20.

**Source and Authority**

See the Source and Authority to Instruction 34:20.

# **CHAPTER 35. MENTAL HEALTH— PROCEEDINGS FOR SHORT-TERM TREATMENT OR LONG-TERM CARE AND TREATMENT OF THE MENTALLY ILL UNDER C.R.S. TITLE 27, ARTICLE 65**

- 35:1 Statement of the Case and Mechanics for Submitting  
Special Verdict—Short-Term Treatment
- 35:2 Statement of the Case and Mechanics for Submitting  
Special Verdict—Long-Term Care and Treatment
- 35:3 Person with a Mental Illness or Mental Health Disorder—  
Defined
- 35:4 Gravely Disabled—Defined
- 35:5 Danger to Self or Others—Defined
- 35:6 Expert Witness—Court-Appointed Professional Person
- 35:7 Special Verdict Form—Short-Term Treatment
- 35:8 Special Verdict Form—Long-Term Care and Treatment

## **35:1 STATEMENT OF THE CASE AND MECHANICS FOR SUBMITTING SPECIAL VERDICT— SHORT-TERM TREATMENT**

**In this proceeding, the petitioner, (*name of person or agency submitting the certification for short-term treatment*) has filed a certification seeking the mental health treatment of the respondent, (*name*), for a term not to exceed three months.**

**The petitioner contends that the respondent is a person with a mental illness or mental health disorder and, as a result, (is a danger [to himself] [to herself] [or] [to others]) (or) (is gravely disabled).**

**The respondent denies (he) (she) is (*insert the appropriate language, e.g., “a person with a mental illness or mental health disorder,” or “a danger to himself or to others,” or “gravely disabled,” etc.*).**

**The respondent further contends that (*insert an***

*appropriate description of any one or more of the conditions required in § 27-65-107(1)(a), (b), and (c), C.R.S., for a valid certification which the respondent contends has not been met).*

**You are instructed to answer the following questions that will be on a Special Verdict form. You must all agree to your answers to each question for which an answer is required. The burden of proof is on the petitioner to prove any “yes” answers to the following questions.**

**Any “yes” answer to 1 or 2 must be proved by clear and convincing evidence.**

**(1. Is the respondent a person with a mental illness or mental health disorder and, as a result of such mental illness or mental health disorder, is the respondent a danger [to himself] [to herself] [or] [to other persons]?)**

**(2. Is the respondent a person with a mental illness or mental health disorder and, as a result of such mental illness or mental health disorder, is the respondent gravely disabled?)**

**If you answer “no” to both questions 1 and 2, stop here, enter your answers on the Special Verdict form and all jurors shall sign it.**

**If you answer “yes” to either question 1 or 2, then answer the following questions.**

**Any “yes” answer to any of the following questions must be proved by a preponderance of the evidence.**

**(3. Did the professional staff of the [insert name of the agency or facility providing the previous seventy-two hour treatment and evaluation] analyze the respondent’s condition, and did they find that the respondent is a person with a mental illness or mental health disorder?**

der and, as a result of such mental illness or mental health disorder, [is a danger (to himself) (to herself) (or) (to others)] [or] [is gravely disabled]?)

(4. Has *[insert name of facility which is to provide short-term treatment]* been designated or approved by the executive director of the State Department of Human Services as a facility authorized to provide short-term mental health treatment?)

(5. Has the respondent been advised of the availability of voluntary treatment?)

(If you answer the preceding question number 5 “yes,” then also answer the following question:

6. Has the respondent not accepted such voluntary treatment or, if the respondent has accepted voluntary treatment, would a reasonable person believe that the respondent will not remain in a voluntary treatment program?)

*(Insert any other questions which may be necessary to resolve properly any other claims of the parties.)*

**Enter your answers on the Special Verdict form and all jurors shall sign it.**

#### Notes on Use

1. This instruction is to be used only in proceedings for short-term mental health treatment commenced under section 27-65-107, C.R.S.

2. With one exception noted below, proceedings are to be conducted “in the same manner as other civil proceedings.” § 27-65-111(1), C.R.S. For this reason:

a. If the parties have stipulated pursuant to C.R.C.P. 48 that the verdict shall be by some stated majority, the instruction should be appropriately modified;

b. The burden of proof, which is on the “person or facility seeking to detain the respondent,” § 27-65-111(1), is by a preponderance of the evidence, § 13-25-127(1), C.R.S., except as to the issues of whether the respondent is mentally ill and whether, as a result of

such mental illness, the respondent is a danger to himself or herself or others or is gravely disabled, which must be established by clear and convincing evidence, § 27-65-111(1). *See also People in Interest of King*, 795 P.2d 273 (Colo. App. 1990). As to what evidence is sufficient to constitute “clear and convincing” evidence, see the cases cited in Source and Authority to Instruction 3:2. For at least short-term commitments, the statutory standard of clear and convincing evidence is sufficient to satisfy state procedural due process requirements. *People v. Stevens*, 761 P.2d 768 (Colo. 1988) (requirements that liberty not be deprived unless the person’s mental illness results in a present danger to him or herself or others or renders the person gravely disabled, and that such be proved by clear and convincing evidence, satisfy due process); *see also Addington v. Texas*, 441 U.S. 418 (1979) (same standard sufficient under federal due process requirements for civil commitments of an indefinite period); *People v. Taylor*, 618 P.2d 1127 (Colo. 1980); *People v. Pflugbeil*, 834 P.2d 843 (Colo. App. 1992).

c. A waiver of the right to counsel in a short-term treatment proceeding must be knowing, voluntary, intelligent, and in writing. § 27-65-107(5). Failure to secure a waiver in compliance with these requirements undermines confidence in the fairness of the proceeding and is reversible error. *People v. Ofengand*, 183 P.3d 688 (Colo. App. 2008).

3. Use whichever bracketed or parenthesized portions of the instruction are appropriate in light of the contentions of the parties and the evidence in the case.

4. For the definition of a “person with a mental illness or mental health disorder,” see Instruction 35:3, and for “gravely disabled,” see Instruction 35:4; *see also* § 27-65-102(11.5), C.R.S. Such other definitional instructions should be given as are appropriate. As to when a person may be considered a danger to others, see *People in Interest of King*, 795 P.2d at 274–75.

5. Under section 27-65-107, in addition to the requisite findings of mental illness and either dangerousness or grave disability on which a certification for short-term treatment depends, § 27-65-106(1) and (6), C.R.S., two other sets of conditions must be met. The first set of conditions found in the first paragraph of section 27-65-107(1) and in sections 27-65-107(2) and (3), goes to the validity of the certification itself and, therefore, any dispute of fact relating to them would appear to present a question for the court to determine as a preliminary matter. *See People in Interest of Bailey*, 745 P.2d 280 (Colo. App. 1987). The second set of conditions found in sections 27-65-107(1)(a), (b), and (c), and set out in numbered questions 3, 4, 5, and 6 of this instruction, is to be determined by the jury, if a jury has been requested pursuant to section 27-65-107(3), and if the nature of the evidence going to any dispute of fact concerning such condition is not such that the issue of fact should be determined by the court in favor of the petitioner. As to rules govern-

ing when a court may direct a finding on an issue of fact in favor of the party having the burden of proof on the issue, see the discussion and cases cited in Note 2 of the Notes on Use to Instruction 2:5. As to the sufficiency of the evidence concerning compliance with the condition set out in numbered paragraph 5 of this instruction, see **People in Interest of Kleinfeldt**, 680 P.2d 864 (Colo. App. 1984).

6. The appropriate special verdict form to be submitted to the jury with this instruction is Instruction 35:7.

7. This instruction may need to be modified in cases involving minors who are voluntary patients who have revoked their consent, but for whom continued hospitalization is being sought. See §§ 27-65-103(4)-(8), C.R.S. Concerning the constitutionality of admitting a minor for treatment on the voluntary application of the minor's parent or legal guardian, but without the consent of the minor, see **P. F. v. Walsh**, 648 P.2d 1067 (Colo. 1982).

8. The failure to appoint counsel "forthwith" for the respondent as required by statute, section 27-65-107(5), "does not create either a personal or subject matter jurisdictional defect." **People in Interest of Clinton**, 762 P.2d 1381, 1388 (Colo. 1988). Neither does the failure to hold a hearing within ten days after a request by the respondent for review of the certification for short-term care or treatment under section 27-65-107(6). **People in Interest of Lynch**, 783 P.2d 848 (Colo. 1989). However, failure to file the certification for short-term treatment within forty-eight hours as required by section 27-65-107(2) deprives the court of jurisdiction. **People in Interest of Santorufo**, 844 P.2d 1234 (Colo. App. 1992). Also, the initiation of a seventy-two hour "hold for evaluation" under section 27-65-105, C.R.S., by a person not authorized by statute, deprives the court of subject matter jurisdiction. **People in Interest of Lloyd-Pellman**, 844 P.2d 1309 (Colo. App. 1992).

9. A person being certified for short-term treatment has a statutory right to have the factual issues presented to and determined by a jury. §§ 27-65-107(3), 27-65-111(1); **People in Interest of Hoylman**, 865 P.2d 918 (Colo. App. 1993).

### Source and Authority

1. This instruction is supported by the authorities cited above in the Notes on Use. See also **Sisneros v. District Court**, 199 Colo. 179, 606 P.2d 55 (1980) (citing the substantially similar earlier version of this instruction with approval, and holding that affirmative findings of fact as to questions 5 and 6 of the instruction are essential to the court's jurisdiction to order commitment).

2. The statutory provision, § 27-65-107(6), which places the burden on a respondent to initiate judicial review of the basis for detaining him or her under a "certification for short-term treatment," rather than

requiring mandatory judicial review of such certification prior to detaining a respondent beyond the initial 72-hour evaluation period, does not, at least on its face, violate due process or equal protection. **People v. Stevens**, 761 P.2d 768 (Colo. 1988) (also, due process does not require that, as a condition precedent to certification, a finding be made that there is no less restrictive alternative available); **Curnow v. Yarbrough**, 676 P.2d 1177 (Colo. 1984).

## 35:2 STATEMENT OF THE CASE AND MECHANICS FOR SUBMITTING SPECIAL VERDICT— LONG-TERM CARE AND TREATMENT

In this proceeding, the petitioner, *(name)*, who is the professional person presently in charge of the mental health evaluation and treatment of the respondent, *(name)*, has filed a petition for an order directing the continued mental health care and treatment of the respondent, *(name)*.

The petitioner contends that the respondent is a person with a mental illness or mental health disorder and, as a result, (is a danger [to himself] [to herself] [or] [to others]) (or) (is gravely disabled). (The petitioner further contends that because of such mental illness or mental health disorder the respondent is not competent to *[insert an appropriate description of any one or more specific legal disabilities the petitioner or copetitioner is seeking to have imposed on the respondent or any one or more of the respondent's legal rights the petitioner or copetitioner is seeking to take away].*)

The respondent denies (he) (she) is *(insert the appropriate language, e.g., "a person with a mental illness or mental health disorder," or "a danger to himself or to others," or "gravely disabled," etc.)*.

The respondent further contends that *(insert an appropriate description of any one or more of the conditions required in § 27-65-109(1)(a), (b), and (c), C.R.S., for a valid order which the respondent contends has not been met)*.

You are instructed to answer the following questions that will be on a Special Verdict form. You must all agree to your answers to each question for which an answer is required. The burden of proof is on the petitioner to prove any "yes" answers to the following questions.

Any "yes" answer to 1 or 2 must be proved by clear and convincing evidence.

(1. Is the respondent a person with a mental illness or mental health disorder and, as a result of such mental illness or mental health disorder, is the respondent a danger [to himself] [to herself] [or] [to other persons]?)

(2. Is the respondent a person with a mental illness or mental health disorder and, as a result of such mental illness or mental health disorder, is the respondent gravely disabled?)

If you answer “no” to both questions 1 and 2, stop here, enter your answers on the Special Verdict form and all jurors shall sign it.

If you answer “yes” to either question 1 or 2, then answer the following questions.

Any “yes” answer to any of the following questions must be proved by a preponderance of the evidence.

(3. Is the respondent because of [his] [her] mental illness or mental health disorder unable to do any of the following competently:

a. *[insert an appropriate description of any one or more (using identifying letters “b.,” “c.,” etc., if there is more than one) specific legal disabilities sought to be imposed or any one or more specific legal rights sought to be taken away under § 27-65-109(4), C.R.S.)]?*)

(4. Did the professional staff of the *[insert name of the agency or facility providing the previous short-term treatment]* analyze the respondent’s condition, and did they find that the respondent is a person with a mental illness or mental health disorder and, as a result of such mental illness or mental health disorder, [is a danger (to himself) (to herself) (or) (to others)] [or] [is gravely disabled]?)

(5. Has *[insert name of facility which is to provide*

*long-term care and treatment]* been designated or approved by the executive director of the State Department of Human Services as a facility authorized to provide long-term mental health care and treatment?)

(6. Has the respondent been advised of the availability of voluntary treatment?)

(If you answer the preceding question number 6 “yes,” then also answer the following question:

7. Has the respondent not accepted such voluntary treatment or, if the respondent has accepted voluntary treatment, would a reasonable person believe that the respondent will not remain in a voluntary treatment program?)

*(Insert any other questions which may be necessary to resolve properly any other claims of the parties.)*

**Enter your answers on the Special Verdict form and all jurors shall sign it.**

#### Notes on Use

1. This instruction is to be used only in proceedings for long-term mental health care and treatment under section 27-65-109, C.R.S. It should be used in original proceedings and in proceedings under section 27-65-109(5) for an order extending long-term care.

2. With one exception noted below, proceedings are to be conducted “in the same manner as other civil proceedings.” § 27-65-111(1), C.R.S. For this reason:

a. If the parties have stipulated pursuant to C.R.C.P. 48 that the verdict shall be by some stated majority, the instruction should be appropriately modified;

b. The burden of proof, which is on the “person or facility seeking to detain the respondent,” § 27-65-111(1), is by a preponderance of the evidence, § 13-25-127(1), C.R.S., except as to the issues of whether the respondent is mentally ill and whether, as a result of such mental illness, the respondent is a danger to himself or herself or others or is gravely disabled, which must be established by clear and convincing evidence, § 27-65-111(1). As to what evidence is sufficient to constitute “clear and convincing” evidence, see the cases

cited in Source and Authority to Instruction 3:2. *See also Addington v. Texas*, 441 U.S. 418 (1979) (holding that in a civil commitment proceeding, brought to commit a person involuntarily for an indefinite period, due process requires that the minimum burden of proof which may be used as to the facts of mental illness and danger to oneself or others is that of “clear and convincing evidence”); *People in Interest of King*, 795 P.2d 273 (Colo. App. 1990);

c. Failure personally to serve a copy of the petition for long-term certification on the individual for whom the treatment is sought, as required by section 27-65-109(2) deprives the probate court of jurisdiction over the matter. *Gilford v. People*, 2 P.3d 120 (Colo. 2000).

3. Use whichever bracketed or parenthesized portions of the instruction are appropriate in light of the issues and the evidence in the case.

4. Numbered paragraph 3 is to be used only if there is a request to impose a legal disability or for a specific legal right be taken away. *See* § 27-65-109(4).

5. If, pursuant to section 27-65-109(4), a copetitioner has been permitted to intervene for the purpose of “seeking the imposition of a legal disability or the deprivation of a legal right,” this instruction must be appropriately modified to identify that person by name, his or her status as a “copetitioner,” and the relief being sought. Such other modifications as may be necessary should also be made.

6. For the definition of a “person with a mental illness or mental health disorder,” see Instruction 35:3, for “gravely disabled,” see Instruction 35:4, and for “danger to self or others,” see Instruction 35:5. Such other definitional instructions should be given as are appropriate. § 27-65-102(11.5), C.R.S.

7. Under section 27-65-109, in addition to the requisite findings of mental illness and either dangerousness or grave disability on which a valid order for long-term treatment depends, section 27-65-109(4), two other sets of conditions must be met. The first set of conditions, found in the first paragraph of section 27-65-109(1), and in section 27-65-109(2), goes to the validity of the petition itself and, therefore, any dispute of fact relating to them would appear to present a question for the court to determine as a preliminary matter. However, the second set of conditions found in section 27-65-109(1)(a)–(c), and set out in numbered questions 4, 5, 6, and 7 of this instruction, is to be determined by the jury, *see* § 27-65-109(4), if a jury has been requested pursuant to section 27-65-109(3), and if the nature of the evidence going to any dispute of fact concerning such condition is not such that the issue of fact should be determined by the court in favor of the petitioner. As to the rules governing when a court may direct a finding on an issue of fact in favor

of the party having the burden of proof on the issue, see the discussion and cases cited in note 2 of the Source and Authority to Instruction 2:5. *See also People in Interest of Lees*, 745 P.2d 281 (Colo. App. 1987) (authority of trial court to grant petitioner judgment on question 7 of this instruction notwithstanding the jury's finding in favor of respondent). As to the sufficiency of the evidence concerning compliance with the condition set out in numbered paragraph 6 of this instruction, see **People in Interest of Kleinfeldt**, 680 P.2d 864 (Colo. App. 1984).

8. The appropriate special verdict form to be submitted to the jury with this instruction is Instruction 35:8.

9. The fact that a certification for short-term treatment is set aside does not invalidate subsequent, otherwise valid certifications for long-term treatment. **People in Interest of Dveirin**, 755 P.2d 1207 (Colo. 1988).

10. This instruction may need to be modified in cases involving minors who are voluntary patients who have revoked their consent, but for whom continued hospitalization is being sought. *See* §§ 27-65-103(4)-(8), C.R.S. Concerning the constitutionality of admitting a minor for treatment on the voluntary application of the minor's parent or legal guardian, but without the consent of the minor, see **P. F. v. Walsh**, 648 P.2d 1067 (Colo. 1982).

11. As to when a person may be considered a danger to others, see **People in Interest of King**, 795 P.2d at 274-75.

### Source and Authority

This instruction is supported by the authorities cited above in the Notes on Use.

### 35:3 PERSON WITH A MENTAL ILLNESS OR MENTAL HEALTH DISORDER—DEFINED

**“Person with a mental illness or mental health disorder” means a person with one or more substantial disorders of the cognitive, volitional, or emotional processes that grossly impairs judgment or capacity to recognize reality or to control behavior. (Developmental disability is insufficient to either justify or exclude a finding of mental illness.)**

#### Notes on Use

1. This instruction must be given whenever Instruction 35:1 or Instruction 35:2 is given and the phrase “a person with a mental illness” is used in such instruction.
2. Unless some reference has been made to developmental disability in the evidence or in some other aspect of the proceedings in the presence of the jury, the parenthesized sentence should be omitted.

#### Source and Authority

1. This instruction is supported by the statutory definition of “mental health disorder.” § 27-65-102(11.5), C.R.S.
2. A prior statutory definition of “mentally ill person,” former § 27-10-102(7), C.R.S., that was substantially similar to this one, was held not to be unconstitutionally vague in **People v. Taylor**, 618 P.2d 1127 (Colo. 1980).

**35:4 GRAVELY DISABLED—DEFINED**

A person is “gravely disabled” if, as a result of a mental health disorder, the person is incapable of making informed decisions about or providing for the person’s essential needs without significant supervision and assistance from other people.

A person is “gravely disabled” only if you also find that the person, as a result of the person’s inability to make informed decisions or provide for the person’s essential needs, is at risk of one or more of the following:

1. Substantial bodily harm;
2. Dangerous worsening of any current serious physical illness;
3. Significant psychiatric deterioration; or
4. Mismanagement of his or her essential needs that could result in substantial bodily harm.

A person of any age may be “gravely disabled,” but such term does not include a person whose decision-making capabilities are limited solely by his or her developmental disability.

**Notes on Use**

1. This instruction must be given whenever Instruction 35:1 or Instruction 35:2 is given and the phrase “gravely disabled” is used in such instruction.

2. Under section 27-65-102(9), C.R.S., “the determination at a certification hearing as to whether a person is ‘gravely disabled’ must focus on the individual’s existing condition, and not on the possibility of future relapse,” that is, that the person might become “gravely disabled” in the future if the person refused to continue to take medication. **People in Interest of Bucholz**, 778 P.2d 300, 302 (Colo. App. 1989) (decision based on statute prior to 1989 amendments).

**Source and Authority**

1. This instruction is supported by the statutory definition of

“gravely disabled.” § 27-65-102(9). *See also* **People v. Taylor**, 618 P.2d 1127 (Colo. 1980) (the definition of “gravely disabled” as mental illness resulting in the lack of ability to take care of one’s basic personal needs is not unconstitutionally vague, nor, in order to be constitutionally sufficient to restrain a person’s liberty, must it be shown that such inability creates an imminent and substantial danger to the person).

2. Probate court is not required to accept testimony that a person was able to support oneself in the past when not in a mental health facility when the record contains evidence that the person could not make informed decisions about essential needs without significant supervision and assistance. **People in Interest of R.K.L.**, 2016 COA 84, ¶ 28, 412 P.3d 827.

**35:5 DANGER TO SELF OR OTHERS—DEFINED**

**“Danger to self or others” means:**

(a) That the person poses a substantial risk of physical harm to (himself) (herself) as shown by evidence of recent threats of or attempts at suicide or serious bodily harm to (himself) (herself); or

(b) That the person poses a substantial risk of physical harm to another person or persons, as shown by evidence:

1. That the person has engaged in recent homicidal or other violent behavior; or

2. That the person has placed another in reasonable fear of violent behavior and serious physical harm, as shown by a recent overt act, attempt, or threat to do serious physical harm.

**Notes on Use**

1. This instruction must be given whenever Instruction 35:1 or Instruction 35:2 is given and the phrase “danger to self or others” is used in such instruction.

2. Use whichever parenthesized and bracketed words are appropriate to the evidence in the case.

3. Prior to enactment of section 27-65-102(4.5), C.R.S., Colorado case law had provided that the Court was justified in ordering continued involuntary treatment based on the testimony of the psychologist as to respondent’s “potentiality for danger.” **People in Interest of King**, 795 P.2d 273, 275 (1990).

**Source and Authority**

1. This instruction is supported by the statutory definition of a “danger to self or others.” § 27-65-102(4.5).

2. Past history of aggressive behaviors combined with evidence that a person declined voluntary treatment, and a history of prior hospitalizations, was sufficient to show danger to others even though there had been no such behavior during current hospitalizations. **People in Interest of R.K.L.**, 2016 COA 84, ¶ 25, 412 P.3d 827.

**35:6 EXPERT WITNESS—COURT-APPOINTED  
PROFESSIONAL PERSON****Use Instruction 3:15.****Note**

Instruction 3:15 (expert witnesses) should be used when the court has appointed a professional person under section 27-65-111(2), C.R.S., and that person has testified. Section 27-65-111(2), C.R.S., provides:

The court, after consultation with respondent's counsel to obtain counsel's recommendations, may appoint a professional person [defined in § 27-65-102(11), C.R.S.] to examine the respondent for whom short-term treatment or long-term care and treatment is sought and to testify at the hearing before the court as to the results of his or her examination. The court-appointed professional person shall act solely in an advisory capacity, and no presumption shall attach to his or her findings.

**35:7 SPECIAL VERDICT FORM—SHORT-TERM  
TREATMENT**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Action No. \_\_\_\_\_**

**In the interest of**

\_\_\_\_\_,  
**Respondent.**

)  
)  
)  
)

**SPECIAL VERDICT**

**We, the jury, present our answers to the questions  
submitted by the Court, to which we have all agreed:**

**(QUESTION NO. 1.**

**Is the respondent a person with a mental illness  
or mental health disorder and, as a result of such  
mental illness or mental health disorder, is the re-  
spondent a danger [to himself] [to herself] [or] [to  
other persons]? (yes or no)**

**ANSWER NO. 1 \_\_\_\_\_)**

**(QUESTION NO. 2.**

**Is the respondent a person with a mental illness  
or mental health disorder and, as a result of such  
mental illness or mental health disorder, is the re-  
spondent gravely disabled? (yes or no)**

**ANSWER NO. 2 \_\_\_\_\_)**

**If you answer (either) (Question number 1) (or)  
(Question number 2) “yes,” then answer the following  
additional questions:**

**(QUESTION NO. 3.**

Did the professional staff of the *[insert name of the agency or facility providing the previous seventy-two hour treatment and evaluation]* analyze the respondent's condition, and did they find that the respondent is a person with a mental illness or mental health disorder and, as a result of such illness or mental health disorder, *[is a danger (to himself) (to herself) (or) (to others)] [or] [is gravely disabled]? (yes or no)*

ANSWER NO. 3 \_\_\_\_\_)

(QUESTION NO. 4.

Has *[insert name of facility which is to provide short-term care and treatment]* been designated or approved by the executive director of the State Department of Human Services as a facility authorized to provide short-term mental health care and treatment? (yes or no)

ANSWER NO. 4 \_\_\_\_\_)

(QUESTION NO. 5.

Has the respondent been advised of the availability of voluntary treatment? (yes or no)

ANSWER NO. 5 \_\_\_\_\_)

(If you answer the preceding question number 5 "yes," then also answer the following question:

QUESTION NO. 6.

Has the respondent not accepted such voluntary treatment? (yes or no)

ANSWER NO. 6 \_\_\_\_\_)

QUESTION NO. 7

If the respondent has accepted voluntary treat-

ment, would a reasonable person believe that the respondent will not remain in a voluntary treatment program? (yes or no)

ANSWER NO. 7 \_\_\_\_\_)

*(Insert any other questions which may be necessary to resolve properly any other claims of the parties.)*

	<b>Foreperson</b>

**Notes on Use**

See notes 4 and 5 of the Notes on Use to Instruction 4:4 and the Notes on Use to Instruction 35:1.

**Source and Authority**

See the Source and Authority to Instruction 35:1.

# **35:8 SPECIAL VERDICT FORM—LONG-TERM CARE AND TREATMENT**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Action No. \_\_\_\_\_**

**In the interest of \_\_\_\_\_ )  
\_\_\_\_\_, ) **SPECIAL VERDICT**  
Respondent. )**

**We, the jury, present our answers to the questions  
submitted by the Court, to which we have all agreed:**

## **(QUESTION NO. 1.**

**Is the respondent a person with a mental illness  
or mental health disorder and, as a result of such  
mental illness or mental health disorder, is the re-  
spondent a danger [to himself] [to herself] [or] [to  
other persons]? (yes or no)**

**ANSWER NO. 1 \_\_\_\_\_)**

## **(QUESTION NO. 2.**

**Is the respondent a person with a mental illness  
or mental health disorder and, as a result of such  
mental illness or mental health disorder, is the re-  
spondent gravely disabled? (yes or no)**

**ANSWER NO. 2 \_\_\_\_\_)**

**If you answer (either) (Question number 1) (or)  
(Question number 2) “yes,” then answer the following  
additional questions:**

## **(QUESTION NO. 3.**

**Is the respondent because of such mental illness or mental health disorder not competent to:**

**a. *[insert an appropriate description of any one or more (using identifying letters "b.," "c.," etc., if there is more than one) specific legal disabilities sought to be imposed or any one or more specific legal rights sought to be taken away under § 27-65-127(4)(c), C.R.S.]?*** (yes or no)

**ANSWER NO. 3.a. \_\_\_\_\_**

**3.b. \_\_\_\_\_**

*[etc., if necessary]*

**(QUESTION NO. 4.**

**Did the professional staff of the *[insert name of the agency or facility providing the previous short-term treatment]* analyze the respondent's condition, and did they find that the respondent is a person with a mental illness or mental health disorder and, as a result of such mental illness or mental health disorder, *[is a danger (to himself) (to herself) (or) (to others)] [or] [is gravely disabled]?* (yes or no)**

**ANSWER NO. 4 \_\_\_\_\_)**

**(QUESTION NO. 5.**

**Has *[insert name of facility which is to provide long-term care and treatment]* been designated or approved by the executive director of the State Department of Human Services as a facility authorized to provide long-term mental health care and treatment? (yes or no)**

**ANSWER NO. 5 \_\_\_\_\_)**

**(QUESTION NO. 6.**

**Has the respondent been advised of the availability of voluntary treatment? (yes or no)**

**ANSWER NO. 6 \_\_\_\_\_)**

**(If you answer the preceding question number 6 “yes,” then also answer the following question:**

**QUESTION NO. 7.**

**Has the respondent not accepted such voluntary treatment or, if the respondent has accepted voluntary treatment, would a reasonable person believe that the respondent will not remain in a voluntary treatment program? (yes or no)**

**ANSWER NO. 7 \_\_\_\_\_)**

*(Insert any other questions which may be necessary to resolve properly any other claims of the parties.)*

_____	_____
_____	<b>Foreperson</b>
_____	_____

**Notes on Use**

See note 4 of the Notes on Use to Instruction 4:4 and the Notes on Use to Instruction 35:2.

**Source and Authority**

See the Source and Authority to Instruction 35:2.

## CHAPTER 36. EMINENT DOMAIN

- 36:1 Instruction to Commissioners as to Duties
- 36:2 Burden of Proof as to Issues
- 36:3 Ascertainment of Value of Property Taken
- 36:4 Ascertainment of Damages and Specific Benefits to Residue
- 36:5 Ascertainment of Damages to Residue—Limitations
- 36:6 Ascertainment of Market Value, Damages, or Specific Benefits—Most Advantageous Uses
- 36:7 Approaches to Valuation
- 36:8 Sales of Comparable Properties
- 36:9 Cost Approach
- 36:10 Income Approach
- 36:11 Report of Commissioners or Verdict Form

### 36:1 INSTRUCTION TO COMMISSIONERS AS TO DUTIES

**This is a proceeding brought by the petitioner, (name), to acquire certain property for (insert brief description, e.g., “park,” “highway”) purposes, which is a public use.**

**The respondent(s), (name[s]), (is) (are) the owner(s) of the property (or of some interest in the property).**

**The property that the petitioner seeks to acquire is designated as (insert identification, e.g., “Parcel A”) and is (shown on the attached exhibit) (described as follows: [insert description]).**

**You are to determine the reasonable market value of the property actually taken (and, if evidence is received by you with regard to any compensable damages to the residue, you may thereafter receive evidence as to any specific benefits to such residue and, if you find either or both damages or specific benefits to exist, then you are also to determine them). (It is not your duty, however, to attempt to determine who**

may own what interests in the property, or the nature, extent or value of any such interests.)

After you have received all the evidence, the court will instruct you further in writing as to the law you should follow in making your determination(s).

You may request this court or the clerk of this court to issue subpoenas to compel witnesses to attend your proceedings and to testify. For the purpose of taking testimony you may hold and adjourn such meetings as may be required, and any one of you may administer oaths to the witnesses who appear before you. You shall hear the testimony and receive any other evidence in accordance with law, and you may request me or any other judge of this court to rule on the propriety of any evidence or on any of the parties' objections to any of the evidence.

You shall view the property and thereafter, having received all the evidence and having been further instructed by this court, you shall without fear, favor or partiality ascertain the reasonable market value of the property actually taken (and the amount of compensable damages, if any, and amount and value of any specific benefit, if any, to the residue of any land not taken).

You shall make, sign and file with the clerk of this court a certificate of your determination(s). You must all agree on your determination(s). The certificate should also accurately describe the property in question. A form for your certificate will be furnished to you later.

#### Notes on Use

1. Use whichever parenthesized words and phrases are appropriate. All references to damages or benefits to the residue should be omitted, for example, if there is a total taking of the property. § 38-1-115(2), C.R.S.

2. If the case is tried before a board of commissioners appointed by

the court, this instruction is required to be given by the court in writing after the commissioners have taken their oaths. § 38-1-105(1) and (2), C.R.S. This same section also requires the court to instruct the commissioners in writing at the conclusion of the testimony as to the law they should follow in reaching their conclusions.

3. If the case is tried to a jury pursuant to section 38-1-106, C.R.S., a suitable instruction explaining the case should be given prior to the taking of evidence, and another instruction setting forth a statement of the case should be given along with other appropriate instructions at the close of the trial. The initial instruction to the jury may be based on the first five paragraphs of this instruction.

4. If less than a fee interest is being condemned (for example, an easement), this instruction should be appropriately modified. Similarly, modification will be required if personal property is being acquired, or if more than one parcel of land is involved in the proceeding.

5. This instruction and the other instructions in this chapter are for use in eminent domain proceedings. The provisions apply to both real and personal property. *See* § 38-1-117, C.R.S. The instructions may also be used in inverse condemnation actions, which are tried as if they were eminent domain cases. **City of Northglenn v. Grynberg**, 846 P.2d 175 (Colo. 1993); **G & A Land, LLC v. City of Brighton**, 233 P.3d 701 (Colo. App. 2010); **Sos v. Roaring Fork Transp. Auth.**, 2017 COA 142, ¶ 12 n.2.

6. The other instructions in this chapter apply to both jury and commission trials and should be given in both types of proceedings. § 38-1-115.

### Source and Authority

1. This instruction is supported by section 38-1-105(2), which sets out the basic duties and powers of the commissioners, and by section 38-1-115, which sets forth the determinations the commissioners are to make.

2. This instruction and the other instructions in this chapter are also supported by sections 38-1-101 to -122, C.R.S.; Colorado Constitution, article II, section 15; and the procedures and law outlined therein.

3. The role of a board of commissioners or a jury is limited to determining the amount of compensation owed for the condemnation, with all other questions and issues for the court. § 38-1-101(2)(a), C.R.S.; **City of Aurora v. Powell**, 153 Colo. 4, 383 P.2d 798 (1963). Commissioners serve a hybrid role as both judge and juror. **State Dep't of Highways v. Copper Mountain, Inc.**, 624 P.2d 936 (Colo. App. 1981). As such, commissioners are entitled to make evidentiary rulings at trial. *See* § 38-1-105(2); **Reg'l Transp. Dist. v. 750 West 48th Ave.**,

LLC, 2015 CO 57, ¶ 15, 357 P.3d 179; **Goldstein v. Denver Urban Renewal Auth.**, 192 Colo. 422, 560 P.2d 80 (1977); **City of Westminster v. Jefferson Ctr. Assocs.**, 958 P.2d 495 (Colo. App. 1997); **State Dep't of Highways v. Mahaffey**, 697 P.2d 773 (Colo. App. 1984); **State Dep't of Highways v. Pigg**, 656 P.2d 46 (Colo. App. 1982). But judicial evidentiary rulings control over commission rulings, whether made before or after the commission has considered evidence. **Reg'l Transp. Dist.**, ¶¶ 16–17, 23. Thus, the court's prior *in limine* orders can be modified only by the court itself, and the commission cannot disregard them. *Id.* at ¶¶ 19–20. And the court has authority to instruct the commission that evidence admitted by the commission is irrelevant and must be disregarded. *Id.* at ¶ 22.

4. The failure of one of the three commissioners to view the property being taken does not warrant overturning the commission's ascertainment of value. **Bd. of Cty. Comm'rs v. McClure Venture**, 41 Colo. App. 524, 594 P.2d 585 (1978).

5. Section 38-1-105(1) requires commissioners to be “disinterested and impartial” and directs the court to conduct a voir dire examination to determine those facts.

6. Disputes as to ownership are to be determined in separate proceedings. § 38-1-105(3); **Vivian v. Bd. of Trs. of Colo. Sch. of Mines**, 152 Colo. 556, 383 P.2d 801 (1963).

## 36:2 BURDEN OF PROOF AS TO ISSUES

The burden of proof is on the respondent, (*name*), to prove by a preponderance of the evidence what the reasonable market value was of the property actually taken on (*insert valuation date*) (and, also, to prove the damages, if any, to the residue). (The burden of proof is on the petitioner, (*name*), to prove by a preponderance of the evidence the amount and value of the specific benefits, if any, to the residue.)

By “burden of proof” is meant the obligation resting on the party who has the burden of proving a proposition to prove the same by a preponderance of the evidence presented in the case, regardless of which party may have produced such evidence.

A fact or proposition has been proved by a “preponderance of the evidence” if, considering all the evidence, you find it to be more probably true than not.

### Notes on Use

1. Omit the parenthesized references in the first paragraph to damages or specific benefits if there is a total taking of the property. § 38-1-114(1) and (2)(b), C.R.S.

2. In cases involving partial acquisitions, damages and specific benefits are treated differently depending on the nature of the condemnation and this instruction will need to be modified based upon the evidence received.

3. For actions under section 38-1-114(1) that do not involve highway acquisitions or transportation projects undertaken by the regional transportation district created by title 32, article 9, of the Colorado Revised Statutes, specific benefits can be offset by the court only against damages to an owner's remaining property. Thus, if no evidence of damages has been received, the parenthesized references in the first paragraph to both damages and specific benefits should be omitted. If evidence of damages has been received but evidence of specific benefits has not, omit the reference only to specific benefits.

4. For actions under section 38-1-114(2) involving highway acquisitions or transportation projects undertaken by the regional transporta-

tion district, specific benefits can be offset against damages to an owner's remaining property and up to 50% of the value of the taken property. See § 38-1-114(2)(d). Accordingly, omit the parenthesized references in the first paragraph to damages or specific benefits only if no evidence has been received for that item.

5. The valuation date to be inserted in the first paragraph is the date "the petitioner is authorized by agreement, stipulation, or court order to take possession or the date of trial or hearing to assess compensation, whichever is earlier." § 38-1-114(1) (acquisitions in general); § 38-1-114(2)(a) (highway or RTD transportation project acquisitions).

### Source and Authority

1. This instruction is supported by section 38-1-114, which defines the valuation date and the manner in which damages and special benefits are treated in different kinds of acquisitions. See also **E-470 Pub. Highway Auth. v. Revenig**, 91 P.3d 1038 (Colo. 2004) (interpreting statute regarding offset of specific benefits against the property taken in highway acquisitions).

2. The standard for and allocation of the burden of proof between the parties on the various issues is derived from **Board of County Commissioners v. Noble**, 117 Colo. 77, 184 P.2d 142 (1947). See also **Jagow v. E-470 Pub. Highway Auth.**, 49 P.3d 1151 (Colo. 2002).

3. For authorities relating to the definition of preponderance of the evidence, see the Source and Authority to Instruction 3:1.

4. Though section 38-1-114(1) refers to the "true and actual" value of the property, the Colorado Supreme Court has construed this to mean "reasonable market value." **Vivian v. Bd. of Trs. of Colo. Sch. of Mines**, 152 Colo. 556, 559–60, 383 P.2d 801, 803 (1963). See also paragraph 2 of the Source and Authority to Instruction 36:3.

5. The valuation date provided by the statute should not be applied strictly if the result would be fundamentally unfair. **Bd. of Cty. Comm'rs v. Delaney**, 41 Colo. App. 548, 592 P.2d 1338 (1978). But see **City of Glendale v. Rose**, 679 P.2d 1096, 1098 (Colo. App. 1983) (the "equitable considerations which led us to adopt the rule in **Delaney** . . . are applicable only to that portion of an award of compensation attributable to 'damages to the remainder' and not to the portion allocated to 'value of the land taken'").

6. Under section 38-1-114(1), the valuation as determined on the valuation date set out in this instruction is an "initial determination," "subject to adjustment for one year . . . to provide for additional damages or benefits not reasonably foreseeable at the time of the . . . determination." The same rules apply to highway and RTD transportation project acquisitions. § 38-1-114(2)(a).

7. For a discussion of the difference between eminent domain proceedings and inverse condemnation actions with respect to the burden of proof and the amount of compensation due, see **Fowler Irrevocable Trust 1992-1 v. City of Boulder**, 17 P.3d 797 (Colo. 2001) (measure of just compensation for temporary taking in inverse condemnation action is fair rental value of property during the period of taking), and **Sos v. Roaring Fork Transportation Authority**, 2017 COA 142, ¶¶ 22-45 (discussing standards for determining inverse condemnation liability and court's discretion to allow restoration costs as damages instead of diminished market value).

### 36:3 ASCERTAINMENT OF VALUE OF PROPERTY TAKEN

You are to determine the value of the property actually taken, and, after having determined such value, you are to state that value in your (certificate) (verdict).

The value you are to determine for the property actually taken is the reasonable market value for such property on (*insert valuation date*). “Reasonable market value” means the fair, actual, cash market value of the property. It is the price the property could have been sold for on the open market under the usual and ordinary circumstances, that is, under those circumstances where the owner was willing to sell and the purchaser was willing to buy, but neither was under an obligation to do so.

In determining the market value of the property actually taken, you are not to take into account any increase or decrease in value caused by the project for which the property is being acquired.

#### Notes on Use

1. In the first paragraph, use the parenthesized term certificate if the case is tried to a commission or verdict if tried to a jury.
2. In the second paragraph, insert the valuation date used in Instruction 36:2.

#### Source and Authority

1. This instruction is supported by section 38-1-115(1)(b), C.R.S., which requires the report of the commissioners or the verdict of the jury to state the value of the land or property actually taken.
2. The definition of market value is supported by **Department of Highways v. Schulhoff**, 167 Colo. 72, 445 P.2d 402 (1968); **Kistler v. Northern Colorado Water Conservancy District**, 126 Colo. 11, 246 P.2d 616 (1952); and **Vivian v. Board of Trustees of Colorado School of Mines**, 152 Colo. 556, 338 P.2d 801 (1963). *See also* **Goldstein v. Denver Urban Renewal Auth.**, 192 Colo. 422, 560 P.2d 80 (1977) (quoting with approval the definition of market value set out in an earlier version of this instruction); **Denver Urban Renewal Auth. v. Pogzeba**, 38 Colo. App. 168, 558 P.2d 442 (1976) (same).

3. The third paragraph is supported by **City of Boulder v. Fowler Irrevocable Trust 1992-1**, 53 P.3d 725, 727–28 (Colo. App. 2002) (under “the ‘project influence rule,’ just compensation cannot include any enhancement or reduction in value that arises from the very project for which the property is being acquired”). See also **Williams v. City & Cty. of Denver**, 147 Colo. 195, 363 P.2d 171 (1961) (an owner is not entitled to recover enhancement resulting from construction or proposed construction of public improvements on the property subject to condemnation); **Dep’t of Health v. Hecla Mining Co.**, 781 P.2d 122, 126 (Colo. App. 1989) (value cannot be “premised on future events which are contingent upon the completion or the existence of the very project which necessitates the public acquisition”).

4. Colorado follows the “undivided basis” rule when valuing condemned property. **Montgomery Ward & Co. v. City of Sterling**, 185 Colo. 238, 523 P.2d 465 (1974) (distinguishing between “undivided basis” rule, the sum of the interests approach, and the strict undivided fee rule for valuing condemned property). Under the undivided basis rule, all interests in the property, including any encumbrances, are deemed to be owned by one person and the property is valued as a whole, while taking into account the value which an encumbrance may add to or subtract from such value. *Id.* at 242, 523 P.2d at 467–68. Thus, in a valuation case to determine the overall compensation to be paid, a lessee of property is not entitled to have his leasehold interest valued separately, see **Vivian**, 152 Colo. at 560–61, 383 P.2d at 803–04, and is barred from bringing an inverse condemnation action against the condemning authority for a separate award for the leasehold interest. **Gifford v. City of Colo. Springs**, 815 P.2d 1008 (Colo. App. 1991).

5. The present reasonable market value of a property is considered in light of its most advantageous use at the time of the condemnation and determined under expansive evidentiary rules. **Palizzi v. City of Brighton**, 228 P.3d 957 (Colo. 2010) (jury should be allowed to consider reasonable probability of a future use, including development and the cost of achieving such use, if it relates to the present market value).

6. Where the government acquires property for public purposes, it may use the property in a manner inconsistent with a restrictive covenant without compensating the other landowners who are subject to that restrictive covenant. A restrictive covenant is not a compensable property right in an eminent domain proceeding. **Forest View Co. v. Town of Monument**, 2020 CO 52, ¶¶ 3, 30, 464 P.3d 774; see also **Smith v. Clifton Sanitation Dist.**, 134 Colo. 116, 300 P.2d 548 (1956).

### 36:4 ASCERTAINMENT OF DAMAGES AND SPECIFIC BENEFITS TO RESIDUE

You are also to determine the amount of compensable damages, if any, and the value of specific benefits, if any, to the residue of (*insert identification used in Instruction 36:1*), and, after having determined any such damages or specific benefits, you are to state the amount of any damages, and the amount and value of any specific benefits in your (certificate) (verdict).

“Residue” means that portion of any property that is not taken but that belongs to the respondent, (*name*), and that has been used by, or is capable of being used by, the respondent, together with the property actually taken, as one economic unit.

Any damages or specific benefits are to be measured by the effects the acquisition of, and the expected uses of, the property actually taken has on the reasonable market value of the residue. Any damages are to be measured by the decrease, if any, in the reasonable market value of the residue, that is, the difference between the reasonable market value of the residue before the property actually taken is acquired and the reasonable market value of the residue after the property actually taken has been acquired. Any damages that may result to the residue from what is expected to be done on land other than the land actually taken from the respondent are not to be considered.

Similarly, any benefits to the residue are to be measured by the increase, if any, in the reasonable market value of the residue due to the (construction) (improvement) of the (*insert brief description of the proposed improvement*). For anything to constitute a specific benefit, however, it must result directly in a benefit to the residue and be peculiar to it. Any benefits that may result to the residue but that are

shared in common with the community at large are not to be considered.

Nothing should be considered as a factor of either damages or benefit unless you find that it increases or decreases the reasonable market value of the residue.

Any finding of damages or specific benefits to the residue shall not affect your determination of the value of the property actually taken.

You are to determine any damages or specific benefits as separate, independent items. You should not attempt to balance the two. Any adjustment or balancing must be done by the court.

#### Notes on Use

1. Use appropriate parenthesized words or phrases as described in the notes on use for the previous instructions in this chapter.
2. This instruction should not be given if there is a total taking of the property.
3. In partial acquisitions, the references to damages and benefits should be included or omitted according to the directions provided in Notes 2 through 4 to the Notes on Use for Instruction 36:2.
4. Instructions 36:3 and 36:5 must also be given with this instruction.
5. In highway or RTD transportation project acquisitions, when an appraiser is determining damages or special benefits to the residue and is forecasting such damages or benefits beyond one year from the date of appraisal, the appraiser "shall take into account a proper discount." § 38-1-114(2)(c), C.R.S. If necessary to a proper evaluation of an appraiser's testimony, another instruction based on this statute should be given.

#### Source and Authority

1. The definition of "residue" is supported by **Board of County Commissioners v. Noble**, 117 Colo. 77, 184 P.2d 142 (1947).
2. The rules relating to the measure of damages and benefits to the residue are supported by **La Plata Electric Ass'n v. Cummins**, 728

P.2d 696, 703 (Colo. 1986) (Landowner was entitled to compensation for damages, including aesthetic damages, caused to the residue and that were attributable to the use of the land taken from the landowner, but not on the land taken or purchased from others; such damages must be the “natural, necessary and reasonable result of the taking, as measured by the reduction in the market value of the remainder . . .”); **Herring v. Platte River Power Authority**, 728 P.2d 709 (Colo. 1986) (same); and **Bement v. Empire Electric Ass’n**, 728 P.2d 706 (Colo. 1986) (same). *See also* **Jagow v. E-470 Pub. Highway Auth.**, 49 P.3d 1151 (Colo. 2002); **Mack v. Bd. of Cty. Comm’rs**, 152 Colo. 300, 381 P.2d 987 (1963); **Colo. M. Ry. v. Brown**, 15 Colo. 193, 25 P. 87 (1890); **Colo. Mountain Props., Inc. v. Heineman**, 860 P.2d 1388 (Colo. App. 1993); **W. Slope Gas Co. v. Lake Eldora Corp.**, 32 Colo. App. 293, 512 P.2d 641 (1973).

3. Section 38-1-115(1), C.R.S., requires damages and benefits to be set forth separately in the certificate or verdict. For the authorities supporting the rules regarding the offset of specific benefits against damages to the remainder or the value of the property taken, see the Notes on Use and Source and Authority for Instruction 36:2.

4. In cases involving a physical taking of property, whether by condemnation or inverse condemnation, the **La Plata** standard applies and a landowner need not prove that any damages to its remaining property are special and unique. But a landowner who is damaged by construction of a project on abutting land must prove that the damages to its own property are special and unique, in other words, not shared in common with the public generally. Whether the damages are special and unique is a threshold determination to be made by the court before such damage claims are presented to the jury. *See* **Pub. Serv. Co. of Colo. v. Van Wyk**, 27 P.3d 377 (Colo. 2001).

5. As to the propriety of treating non-contiguous land as “residue” when it has been used or is capable of being used with the property taken as one economic unit, see **Board of County Commissioners v. Delaney**, 41 Colo. App. 548, 592 P.2d 1338 (1978).

6. Generally, no evidence of special benefits to the remaining property from the improvement can be presented in a compensation proceeding when the government has levied a special assessment for the same improvement. **E-470 Pub. Highway Auth. v. 455 Co.**, 3 P.3d 18 (Colo. 2000) (general rule held inapplicable to temporary highway expansion fee to be used primarily for debt reduction and maintenance).

7. As to when the elimination of one of two access points between the residue and the public road system may constitute damage to the residue, see **State Department of Highways v. Interstate-Denver West**, 791 P.2d 1119 (Colo. 1990). *See also* **Dep’t of Transp. v. First Interstate Commercial Mortg. Co.**, 881 P.2d 473 (Colo. App. 1994) (compensation for loss of access to street or highway is only required if

ingress and egress to property is substantially impaired).

The purpose of this section is to provide a clear and concise statement of the law governing the taking of private property for public use. It is intended to be a guide for the courts and the public alike. The section is divided into two parts. The first part deals with the taking of property for public use, and the second part deals with the taking of property for private use. The first part is divided into two sections. The first section deals with the taking of property for public use, and the second section deals with the taking of property for private use. The second part is divided into two sections. The first section deals with the taking of property for public use, and the second section deals with the taking of property for private use.

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### 36:5 ASCERTAINMENT OF DAMAGES TO RESIDUE—LIMITATIONS

In order for you to determine damages to the residue, you must find that the residue itself (has been) (will be) damaged by some diminution in its reasonable market value, either as a result of its being severed from the land actually taken or because the adjacent public use on the land actually taken from the respondent (, but not on other land,) will render the residue less valuable.

Infringement of the owner's personal pleasure or enjoyment in the use of the residue or even the owner's annoyance or discomfort do not constitute compensable damages. Neither does the fact that the residue may be less desirable for certain purposes. Such matters are not compensable except as they are a natural, necessary and reasonable result of the residue being severed from the land actually taken or of the uses expected to be made of the land actually taken, and are measurable by a reduction in the market value of the residue.

(Damages may not be allowed which result from *[describe any noncompensable damages]* even though a decrease in the reasonable market value of the residue may result.)

#### Notes on Use

1. Use whichever parenthesized words are appropriate to the evidence in the case.

2. Omit the parenthesized clause in the first paragraph if the only relevant public use involved in the project will be on the land actually taken from the respondent.

3. Omit the parenthesized last paragraph unless some reference has been made in the evidence, or otherwise, to an item of damage that might affect the market value of the residue but which is not compensable as a matter of law. See *La Plata Elec. Ass'n v. Cummins*, 728 P.2d 696 (Colo. 1986).

4. This instruction must be given with Instruction 36:4.

### Source and Authority

1. This instruction is supported by the authorities cited in the Source and Authority for Instruction 36:4.

2. The rule in **La Plata Electric Ass'n**, 728 P.2d at 701–03, is that damages to the residue need not be unique or peculiar to be compensable. When there is a partial taking, the “landowner is entitled to recover all damages that are the natural, necessary and reasonable result of the taking, as measured by the reduction in the market value of the remainder of the property.” *Id.* at 703.

3. A landowner cannot recover for loss of passing motorists’ views of residue from a highway. **Dep’t of Transp. v. Marilyn Hickey Ministries**, 159 P.3d 111 (Colo. 2007) (no compensable loss when view from freeway of church building was blocked by elevated light rail wall built along freeway).

4. In contrast to damages based on the property’s fair market value, losses suffered from the frustration of the landowner’s special plan for the property are not compensable. **Bd. of Cty. Comm’rs v. DPG Farms, LLC**, 2017 COA 83, ¶ 29. But “[t]he line between evidence of a hypothetical development plan, the frustration of which is not compensable in damages, and evidence of potential income generation, the admission of which is relevant to an income approach, is not always easy to draw.” *Id.* at ¶ 30. And a court may have discretion in certain circumstances to allow an award for restoration costs rather than diminished market value if “there is a reason personal to the owner for restoring the original condition.” **Sos v. Roaring Fork Transp. Auth.**, 2017 COA 142, ¶¶ 39, 58 (quoting RESTATEMENT (SECOND) OF TORTS § 929 (1979) and affirming district court’s rejection of jury instructions regarding diminution in value as measure of damages in inverse condemnation case).

### 36:6 ASCERTAINMENT OF MARKET VALUE, DAMAGES, OR SPECIFIC BENEFITS— MOST ADVANTAGEOUS USES

In determining the market value of the property actually taken (and the damages, if any, and specific benefits, if any, to the residue) you should consider the use, conditions and surroundings of the property as of the date of valuation.

In addition, you should consider the most advantageous use or uses to which the property might reasonably and lawfully be put in the future by persons of ordinary prudence and judgment. Such evidence may be considered, however, only insofar as it assists you in determining the reasonable market value of the property as of the date of valuation (or the damages, if any, or the specific benefits, if any, to the residue). It may not be considered for the purposes of allowing any speculative damages or values.

#### Notes on Use

Use the parenthesized clauses relating to damages and benefits, or such portions thereof, as are appropriate per Notes 2 through 4 to the Notes on Use for Instruction 36:2.

#### Source and Authority

1. This instruction is supported by **Ruth v. Department of Highways**, 145 Colo. 546, 359 P.2d 1033 (1961); **Board of County Commissioners v. Noble**, 117 Colo. 77, 184 P.2d 142 (1947); and **Wassenich v. City & County of Denver**, 67 Colo. 456, 186 P. 533 (1919).

2. The present reasonable market value of a property is considered in light of its most advantageous use at the time of the condemnation and is determined under expansive evidentiary rules. **Palizzi v. City of Brighton**, 228 P.3d 957 (Colo. 2010) (jury should be allowed to consider reasonable probability of a future use, including development and the cost of achieving such use, as they relate to the present market value); *see also* **State Dep't of Highways v. Mahaffey**, 697 P.2d 773, 776 (Colo. App. 1984) (citing this instruction and holding, "evidence of a reasonable future use is admissible to determine the present fair market value of property . . . and compensation is not limited to the value of the property for the uses to which it is devoted at the time of the

taking"). A property's "most advantageous use" is synonymous with its "highest and best use." **Bd. of Cty. Comm'rs v. DPG Farms, LLC**, 2017 COA 83, ¶ 13 (discussing these terms interchangeably and delineating the four factors to be used in determining highest and best use). The determination of a property's highest and best use is generally a factual question for the jury unless the evidence of highest and best use is so improbable or speculative that it should be excluded from the jury as a matter of law. *Id.* at ¶ 16.

3. Regarding the probability of the property being rezoned, see **Stark v. Poudre School District R-1**, 192 Colo. 396, 560 P.2d 77 (1977) (evidence of the probability, but not of only a possibility, of a rezoning may be considered); and **State Department of Highways v. Ogden**, 638 P.2d 832 (Colo. App. 1981) (because the probability of rezoning may be considered to the extent such probability would reasonably be reflected in the market value of the property at the time of taking, improper to instruct jury that in determining value only the zoning in existence at the time of taking may be considered).

4. With respect to the valuation of unsubdivided land, see **Board of County Commissioners v. Vail Associates, Ltd.**, 171 Colo. 381, 389, 468 P.2d 842, 846 (1970) ("The measure of compensation is not the aggregate of values of individual plots into which the tract taken could best be divided, but rather the value of the whole tract as it exists at the time of condemnation, taking into consideration its highest and best future use."); and **Department of Highways v. Schulhoff**, 167 Colo. 72, 445 P.2d 402 (1968).

5. Where the government acquires property for public purposes, it may use the property in a manner inconsistent with a restrictive covenant without compensating the other landowners who are subject to that restrictive covenant. A restrictive covenant is not a compensable property right in an eminent domain proceeding. **Forest View Co. v. Town of Monument**, 2020 CO 52, ¶¶ 3, 30, 464 P.3d 774; *see also* **Smith v. Clifton Sanitation Dist.**, 134 Colo. 116, 300 P.2d 548 (1956).

## 36:7 APPROACHES TO VALUATION

There are three generally established real estate appraisal methods: (1) the comparable sales method, which considers recent sales of comparable properties; (2) the cost of construction method, which estimates value based on the cost of replacing or reproducing a particular improvement; and (3) the income method, which considers the property's earning power. Depending on the location and type of property involved and other relevant circumstances, an (appraiser) (expert) may use any one, two, or all three of these methods to evaluate the reasonable market value of the property being taken.

You should consider all relevant factors that tend to provide a means for arriving at a fair determination of the property's reasonable market value. It is your duty to weigh the opinions and judge the credibility of the (appraiser) (expert) to determine which method or methods are most indicative of the reasonable market value of the property being taken.

### Notes on Use

1. This instruction should be given only if witnesses have testified about using two or more of the established real estate appraisal methods to evaluate the property being taken.
2. If an appraiser or other expert witness relies upon other permissible approaches to determine value, this instruction should be modified to include a general description of such other approach.

### Source and Authority

1. This instruction is supported by **Bly v. Story**, 241 P.3d 529 (Colo. 2010); **Denver Urban Renewal Authority v. Berglund-Cherne Co.**, 193 Colo. 562, 568 P.2d 478 (1977); **Board of County Commissioners v. DPG Farms, LLC**, 2017 COA 83, ¶¶ 25–28; and **State Department of Highways v. Mahaffey**, 697 P.2d 773 (Colo. App. 1984).

2. An appraiser may use any one, two, or all three traditional appraisal methods to evaluate the reasonable market value of the property being taken. **Mahaffey**, 697 P.2d at 775.

3. It is the duty of the trier of fact to weigh the witnesses' opinions and credibility and determine which appraisal methods are most indicative of reasonable market value. **Bly**, 241 P.3d at 537; **Berglund-Cherne**, 193 Colo. at 567, 568 P.2d at 481.

4. Other valuation methods, aside from the three traditional appraisal methods, are permitted in certain circumstances. **City of Englewood v. Denver Waste Transfer, L.L.C.**, 55 P.3d 191 (Colo. App. 2002). These circumstances may include a lack of sufficient comparable sales, conditions that make the market value of property uncertain, or other unique factors that apply to the property being taken. *Id.* at 196.

**36:8 SALES OF COMPARABLE PROPERTIES**

You have heard or seen evidence about market transactions involving properties that may be comparable to the property being taken. Sales of comparable properties are relevant evidence either to directly show the reasonable market value of the property being taken or to establish the basis for an (appraiser's) (expert's) opinion of reasonable market value. An (appraiser) (expert) may adjust a comparable sale to take into account various differences between the comparable sale and the property being taken.

In determining the weight of such evidence, you may consider the time of the comparable sale; the comparable property's size, location, zoning, and condition; and any and all other differences, facts, or circumstances.

An (appraiser) (expert) may use the comparable sales approach even if other methods of valuation are available.

**Notes on Use**

This instruction should be given only if comparable sales have been offered as direct evidence of value or if an expert witness has used the comparable sales approach.

**Source and Authority**

1. This instruction is supported by **Goldstein v. Denver Urban Renewal Authority**, 192 Colo. 422, 560 P.2d 80 (1977); **Kistler v. Northern Colorado Water Conservancy District**, 126 Colo. 11, 246 P.2d 616 (1952); **Wassenich v. City & County of Denver**, 67 Colo. 456, 186 P. 533 (1919); and **Loloff v. Sterling**, 31 Colo. 102, 71 P. 1113 (1903).

2. Testimony regarding the consideration involved in a recorded transfer of property is admissible only if the witness has personally verified the sale, according to the requirements of section 38-1-118, C.R.S. Any such testimony is subject to rebuttal and objections as to relevance and materiality. *Id.*

3. Sales of comparable properties are relevant either as direct evi-

dence of reasonable market value or as a basis for expert opinion on value. **Goldstein**, 192 Colo. at 424 n.1, 560 P.2d at 82 n.1.

4. Adjusting the purchase price of a completed sale is an accepted method for comparing the sale property to the property being taken. *See Goldstein*, 192 Colo. at 425–27, 560 P.2d at 83–84. The weight to be given such evidence lies within the discretion of the factfinder. *See id.*

5. When sales are so dissimilar in respect to either locality, character of the lands involved, or remoteness in time, such evidence may be inadmissible. **Bd. of Cty. Comm’rs v. Vail Assocs., Ltd.**, 171 Colo. 381, 468 P.2d 842 (1970); *see also Dep’t of Highways v. Schulhoff*, 167 Colo. 72, 445 P.2d 402 (1968) (trial court properly ruled sales of individual sites within platted subdivision not comparable for purposes of determining value of unsubdivided tract); **Sinclair Transp. Co. v. Sandberg**, 228 P.3d 198 (Colo. App. 2009) (upholding exclusion of sale because sale property not comparable in size, location, or future use), *rev’d on other grounds sub nom. Larson v. Sinclair Transp. Co.*, 2012 CO 36, 284 P.3d 42; **City of Westminster v. Jefferson Ctr. Assocs.**, 958 P.2d 495 (Colo. App. 1997) (distinguishing *Schulhoff*, 167 Colo. at 81, 445 P.2d at 407, and holding that, under the circumstances, trial court erred in instructing commission that it could not consider sales of platted, subdivided property in determining the fair market value of the property taken); **Bd. of Cty. Comm’rs v. Evergreen, Inc.**, 35 Colo. App. 171, 532 P.2d 777 (1974) (for platted and developed land, it was proper to admit sales of sites that were in a similar state of development).

6. Sales occurring after the date of value are admissible if they are sufficiently comparable in character, close in time, and in location to be probative of the value of the property being taken, and if the risk that the factfinder would be prejudiced, confused, or misled is slight. **State Dep’t of Highways v. Town of Silverthorne**, 707 P.2d 1017 (Colo. App. 1985).

7. The parties are not entitled to indirectly increase or decrease the value of the property being taken by comparing it with project-influenced sales — sales of other land where the value was enhanced or depressed by the very project for which the subject property is being acquired — without adjusting for that influence. **Vail Assocs.**, 171 Colo. at 391, 468 P.2d at 847; *see also Bd. of Cty. Comm’rs v. Highland Mobile Home Park, Inc.*, 543 P.2d 103 (Colo. App. 1975) (presuming that the commission followed a stipulated instruction advising that the condemnor had not submitted any competent evidence of enhancement due to the project and instructing the commissioners to disregard any claim of enhancement in determining value); **Bd. of Cty. Comm’rs v. Tenbrook**, 491 P.2d 597 (Colo. App. 1971) (upholding the admission into evidence of recent sales near the interstate project where cross-examination revealed that the new interstate may not have caused any enhancement and the trial court specifically instructed the commis-

sioners not to consider any enhancement from the project).

## 36:9 COST APPROACH

The cost to replace or reproduce improvements, less any depreciation, may properly be considered in arriving at a determination of the reasonable market value of the property being taken.

An (appraiser) (expert) may use the cost approach even if other methods of valuation are available.

### Notes on Use

This instruction should be given only if a witness has testified about using the cost approach to evaluate the property being taken.

### Source and Authority

This instruction is supported by **Bly v. Story**, 241 P.3d 529 (Colo. 2010); **Denver Urban Renewal Authority v. Berglund-Cherne Co.**, 193 Colo. 562, 568 P.2d 478 (1977); and **Farrar v. Total Petroleum, Inc.**, 799 P.2d 463 (Colo. App. 1990).

**36:10 INCOME APPROACH**

The income approach values the property being taken based on projections of the net income generated by the property during the remainder of its productive life. Under this approach, an (appraiser) (expert) analyzes a property's capacity to generate income. Then, using various techniques and mathematical procedures, the (appraiser) (expert) converts this income into an indication of the property's reasonable market value.

The income approach can be used on properties that produced income on the date of value, as well as properties that could produce income. The income approach depends upon the (appraiser) (expert) estimating the rental value or other income, as well as expenses and the rate of return over a period of time.

An (appraiser) (expert) may use the income approach even if other methods of valuation are available.

**Notes on Use**

1. This instruction should be given only if a witness has testified about using the income approach to evaluate the property being taken.
2. If an appraiser or other expert witness uses an income capitalization method or discounted cash flow analysis to determine value, modifications to this instruction or the use of additional instructions to reflect the details of that specific income valuation method may be appropriate.

**Source and Authority**

1. This instruction is supported by **Board of County Commissioners v. DPG Farms, LLC**, 2017 COA 83, ¶¶ 25, 27; **Bly v. Story**, 241 P.3d 529 (Colo. 2010); **Denver Urban Renewal Authority v. Berglund-Cherne Co.**, 193 Colo. 562, 568 P.2d 478 (1977); and **State Department of Highways v. Mahaffey**, 697 P.2d 773 (Colo. App. 1984).
2. The business profit rule generally requires the exclusion of busi-

ness profits generated by an enterprise on the property. The foundation for the rule is that (1) the business itself is not being condemned and can be relocated, and (2) business profits are more a function of the entrepreneurial skills of management than of the value of the land. **Berglund-Cherne Co.**, 193 Colo. at 567, 568 P.2d at 481; **Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Auth.**, 183 Colo. 441, 517 P.2d 845 (1974); **City & Cty. of Denver v. Hinsey**, 177 Colo. 178, 493 P.2d 348 (1972). Under the business profit rule, evidence of the character and volume of business conducted on the premises is admissible only for the purpose of showing a use to which the land could be put. **Berglund-Cherne**, 193 Colo. at 567, 568 P.2d at 482; **Hinsey**, 177 Colo. at 183, 493 P.2d at 351; **Denver Urban Renewal Auth. v. Cook**, 186 Colo. 182, 526 P.2d 652 (1974); **City & Cty. of Denver v. Quick**, 108 Colo. 111, 113 P.2d 999 (1941). But a crucial distinction must be made between "profits derived from a business conducted on the premises" and "profits derived from the land itself." Only the first is inadmissible under the rule. For example, evidence of agricultural and rental income is admissible as "profit[] derived from the land itself." **Bd. of Cty. Comm'rs v. Delaney**, 41 Colo. App. 548, 592 P.2d 1338 (1978); **Berglund-Cherne**, 193 Colo. at 567, 568 P.2d at 482; **Montgomery Ward & Co. v. City of Sterling**, 185 Colo. 238, 523 P.2d 465 (1974); **Quick**, 108 Colo. at 115-16, 113 P.2d at 1001; **Farmers' Res. & Irrigation Co. v. Cooper**, 54 Colo. 402, 130 P. 1004 (1913); *see also* **Mahaffey**, 697 P.2d at 775-77 (upholding admission of an opinion of fair market value that was based on estimated net income from the extraction of gravel from the property being taken). The fair economic rental value of commercial property is also evidence of "profit derived from the land itself" and is therefore admissible as a determinant of value in conjunction with the income approach. **Berglund-Cherne**, 193 Colo. at 567, 568 P.2d at 482 (citing 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, § 180, p. 704 (2d ed. 1953)). In addition, evidence of business profits and losses may be directly admissible and compensable when the business itself is being taken. **Clare v. Florissant Water & Sanitation Dist.**, 879 P.2d 471, 473-74 (Colo. App. 1994) ("[A]n owner is entitled to compensation for the value of a business when a governmental authority appropriates the business.").

**36:11 REPORT OF COMMISSIONERS OR VERDICT  
FORM**

**IN THE DISTRICT COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Civil Action No. \_\_\_\_\_**

_____	)	(CERTIFICATE OF
	)	ASCERTAINMENT
Petitioner,	)	AND ASSESSMENT
	)	AND REPORT
	)	OF COMMISSIONERS)
vs.	)	(VERDICT)
	)	
_____	)	
Respondent.	)	

**We, the (jury) (Commissioners), ascertain and  
assess:**

- 1. The property taken is described as (*insert “an accurate” description*) in the Count(y)(ies) of (*name[s]*),  
State of Colorado.**
- 2. The value of the property actually taken is  
\$\_\_\_\_\_**
- (3. The damages to the residue of such property  
are \$\_\_\_\_\_)**
- (4. The amount and value of the specific benefit  
to the residue of such property is \$\_\_\_\_\_)**

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

certify the above as our ascertainment and assessment in the cause before us and submit the same as our report and certificate of ascertainment and assessment.

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Commissioner

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Commissioner

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Commissioner)

### Notes on Use

1. Use whichever parenthesized portions are appropriate for a Commission or Jury.
2. Use the paragraphs for damages and specific benefits as applicable per Notes 2 through 4 to the Notes on Use for Instruction 36:2.
3. In addition to the mandatory contents of the verdict or report, section 38-1-115(3), C.R.S., provides that the report of the Commissioners or the verdict of the jury may also contain such other findings or answers to interrogatories as the court in its discretion may require to establish the value of the property condemned on an undivided basis.
4. See the Notes on Use to Instruction 4:4 (verdict form for plaintiff).

### Source and Authority

1. This form is supported by section 38-1-105(2), C.R.S., requiring commissioners to make, subscribe, and file a certificate of their ascertainment and assessment. *See also Pueblo & Ark. Valley R.R. Co. v. Rudd*, 5 Colo. 270 (1880) (construing an earlier form of the statute and holding that report or verdict must show damages and benefits were considered).
2. For a discussion of the property owner's right to a jury trial and a jury verdict, see sections 38-1-106 and 107, C.R.S.
3. The restrictions on the impeachment of jury verdicts set out in CRE 606(b) also apply to a Commissioners' certificate of ascertainment and assessment. *Aldrich v. Dist. Court*, 714 P.2d 1321 (Colo. 1986).

## CHAPTER 37. RESERVED FOR FUTURE USE

## **CHAPTER 38. RESERVED FOR FUTURE USE**

## **CHAPTER 39. RESERVED FOR FUTURE USE**

## **CHAPTER 40. CHILDREN'S CODE— JUVENILE DELINQUENCY**

- 40:1 Introductory Remarks to Jury Panel
- 40:2 General Outline of Trial Procedures to Jury
- 40:3 Summary Closing Instruction
- 40:1 Introductory Remarks to Jury Panel
- 40:2 General Outline of Trial Procedures to Jury
- 40:3 Summary Closing Instruction

### **Introductory Note**

Pursuant to the provisions of sections 19-1-105(1) and 19-2-107(1), C.R.S., a juvenile is entitled to a jury trial only in limited circumstances. As a result, very few juvenile delinquency jury trials are held in Colorado's courts. When the right to a jury trial exists, the provisions of section 19-2-805, C.R.S., and the Colorado Rules of Juvenile Procedure provide that proceedings in delinquency be conducted in accordance with the Colorado Rules of Criminal Procedure except as they relate to the examination and selection of jurors. As a result, only instructions relating to the examination of the jury panel and the selection of the jury have been provided in this chapter. The user is directed to consult the Colorado Model Criminal Jury Instructions for all jury instructions that are not provided in this chapter.

**40:1 INTRODUCTORY REMARKS TO JURY PANEL**

*(The remarks of the Court to the members of the jury panel at the commencement of the trial should be substantially as follows:)*

**Members of the jury, this is** *(insert appropriate description, e.g., "Courtroom A," "Division II," etc.)* **of the (Juvenile) (District) Court. My name is** *(insert name)*. **I am the judge assigned to preside in this case.**

**First, I want to tell you about the rules that will govern your conduct during your jury duty, beginning right now, even if you are not finally selected as jurors. If you are chosen as jurors, your job will be to decide this case based solely on the evidence presented during the trial and the instructions that I will give you. You will not be investigators or researchers, so do not attempt to gather any information about this case on your own. Do not read or do research about this case or the issues in the case from any other source, including the Internet. You may not use Google, Bing, Yahoo, or any other type of Internet search engine to learn about any person, place, or thing that is involved in this case. Do not read about this case in newspapers, magazines, or any other publications. Do not listen to any podcasts or television or radio broadcasts about the trial. Do not consult dictionaries; medical, scientific, or technical publications; religious books or materials; or law books. I want to emphasize that you must not seek or receive any information about this case from the Internet, which includes all social networking sites, Google, Wikipedia, blogs, and other websites.**

**If you were to violate this rule by receiving outside information about the case, it could force me to declare a mistrial, meaning that the trial would have to start over, and all of the parties' work, my work, and your work on this case would be wasted.**

**Therefore, it is very important that you not**

receive outside information about this case, whether it comes from other people, from the media, from books or publications, or from the Internet. You are free to use the Internet, but only for purposes unrelated to this case. Do not search for or receive any information about the parties, the lawyers, the witnesses, the judge, the evidence, or any place or location mentioned. Do not research the law. Do not look up the meaning of any words or scientific or technical terms used. If necessary, I will give you definitions of words or terms.

Also, you are not allowed to visit any place(s) involved in this case. If you normally travel through such a place, you should try to take a different route until I tell you that your jury service is completed. If you cannot take a different route, you must not stop or attempt to gather any information from that location.

Until I tell you that your jury service is complete, do not communicate about the case with anyone, including family and friends, whether in person, or by telephone, cell phone, smart phone, computer, Internet, or any Internet service. This means you must not email, text, instant message, Tweet, blog, or post information about this case, or about your experience as a juror on this case, on any social networking site, website, listserv, chat room, or blog.

When court is not in session, you may communicate about anything other than this case. You may tell others that you are on jury duty and that you cannot talk about this duty until your service is completed, and you may tell them the estimated schedule of your jury duty, but do not tell them anything else about the case. If anyone tries to communicate with you about anything concerning the case, you must stop the communication immediately and report it to the Bailiff, who will notify me.

(The Court) (I) will now introduce you to this case.

The case we are about to try is not a criminal or civil case, but a juvenile delinquency case under the Colorado Children's Code. The parties to this case are: (1) the People of the State of Colorado, who will be referred to during the trial as "the People" or "the Prosecution;" (2) *(insert juvenile's name)*, who may be referred by name or as "the Juvenile;" and *(name of respondent[s])*, who (are) (is) the (parent[s]) (guardian[s]) (custodian[s]) of the Juvenile and (is) (are) referred to as "Respondent(s)."

The case is based upon a petition that claims: *(here read a short statement of the case)*. You should understand that this petition is only a charge and it is not in any sense evidence of the statements it contains.

The Juvenile has pleaded not guilty to the charge(s) made in the petition. The People, therefore, have the burden of proving the charge(s) (or count[s]) beyond a reasonable doubt. The purpose of this trial is to determine whether the charges in the petition have been proved beyond a reasonable doubt. The jury will make this determination. The jury will consider all the evidence received during the trial and will make its determination with the help of instructions from the Court as to the law applicable to the case.

(The Court) (I) will now read you some of the instructions that may apply in this case. These are preliminary instructions about the law and may not be exactly the same as the final instructions about the law you will be given at the end of the case to use in your deliberations. If there is any difference between the preliminary and final instructions, you must follow and be governed by the final instructions in deciding the case. You should not be concerned about any difference between the preliminary in-

**structions and the final instructions.** (*Insert applicable jury instructions, such as the definition of the burden of proof and any applicable evidentiary standards.*)

**It will be the sole responsibility of the jurors chosen to try the case to determine the facts from all the evidence received during the trial.**

**To meet this responsibility you, as jurors, have a duty to determine the facts and apply the law impartially.**

**In this case, the parties are entitled to a jury trial. Trial by jury is a traditional way for people to render justice among themselves. Each juror plays an equal and important part in this American plan for justice. This requires your close attention, absolute honesty and impartiality, and sound judgment.**

**It has been estimated that this trial will last** (*insert number*) **days.** (*The Court may either at this time or later inquire whether there are any members of the jury panel who would be unable to serve during the trial if selected as jurors.*)

**In this case, it will not be necessary to keep the jurors together at noon or at night until the case is finally given to you for your decision.**

#### **Notes on Use**

1. This instruction should be used rather than Instruction 1:1. See Notes on Use to Instruction 1:1.
2. Use whichever parenthesized words are appropriate.
3. This instruction should be modified to reflect current communication methods and information-gathering technology.

#### **Source and Authority**

1. This instruction is supported by C.R.J.P. 1, C.R.C.P. 47, and Crim. P. 24.
2. C.R.J.P. 1 provides in part: "Proceedings in delinquency shall be

conducted in accordance with the Colorado Rules of Criminal Procedure, except as otherwise provided by statute or by these rules." C.R.J.P. 3.5(b) and section 19-2-805, C.R.S., provide that the examination and selection of jurors in delinquency proceedings shall be as provided by C.R.C.P. 47, except that the grounds for challenge for cause are governed by Crim. P. 24. C.R.C.P. 47(a)(1), in turn provides, "An orientation and examination shall be conducted to inform prospective jurors about their duties and service." C.R.C.P. 47(a)(2)(IV) requires that the judge explain the "nature of the case" in "plain and clear language."

3. In most cases, no jury trial is permitted in a delinquency case. §§ 19-1-105 & 19-2-107(2), C.R.S.; *see also* **People in Interest of A.B.-B.**, 215 P.3d 1205 (Colo. App. 2009). In cases where a jury trial is authorized, under section 19-2-107(1), the "juvenile or the district attorney may demand a trial by a jury of not more than six persons . . . or the court, on its own motion, may order" one. *See also* § 19-2-601(3)(a), C.R.S. (providing that when the child is alleged to be an "aggravated juvenile offender," the child may request a jury of twelve).

4. As to the constitutionality of section 19-2-107(2) (formerly section 19-1-106(4)(a)(I), C.R.S.), excluding the right to jury trial in less serious delinquency adjudications, *see* **People in Interest of T.M.**, 742 P.2d 905 (Colo. 1987). *See also* **A.C. v. People**, 16 P.3d 240 (Colo. 2001) (upholding constitutionality of section 19-2-107, and construing statute to mandate jury trial only when juvenile is charged as an aggravated juvenile offender or with a crime of violence). The child does not have a "fundamental right" to elect to be tried by the court if the state demands a jury trial. **S.A.S. v. Dist. Court**, 623 P.2d 58 (Colo. 1981) (construing what was formerly section 19-1-106(4), C.R.S.).

5. Concerning the form and content of delinquency petitions, *see* section 19-2-513, C.R.S., and C.R.J.P. 3.1(a). Although the parents of the juvenile must be named in the petition and may attend delinquency hearings, they have no due process right to participate as actual parties in interest in the adjudicative phase of the proceedings. **People in Interest of J.P.L.**, 214 P.3d 1072 (Colo. App. 2009).

6. The burden of proof in juvenile delinquency cases is beyond a reasonable doubt. § 19-1-103(2), C.R.S.; **S.A.S.**, 623 P.2d at 61.

## 40:2 GENERAL OUTLINE OF TRIAL PROCEDURES TO JURY

I will now explain the procedure that is usually followed during a trial. Before the trial begins, I will orally give you some preliminary instructions to provide you with a framework for the evidence that will be presented. (You will also receive copies of these preliminary instructions.)

The attorneys will then have the opportunity to present opening statements. The purpose of opening statements is to give you an outline of each party's claims and defenses. You must remember, however, that what is said in opening statements and all other statements made by the attorneys are not evidence. Your verdict must be based upon the evidence in this case and the instructions regarding the law that governs this case. The evidence usually consists of the sworn testimony of witnesses, the exhibits which are received and any facts which are admitted or agreed to or are judicially noticed.

(Also, during the course of this trial, [the court] [the attorneys] will [make] [read] brief statements summarizing the evidence already presented [and outlining how this evidence relates to evidence that will be presented later in the trial]. These statements are not evidence and are only made for the purpose of assisting you in understanding this case.)

Once the trial begins, the People will present evidence. The Juvenile's attorney is permitted to cross-examine all witnesses presented by the People. Upon the conclusion of the People's case, the Juvenile's attorney may offer evidence on behalf of the Juvenile, but is not required to do so. The burden is always on the People, represented by the district attorney, to prove beyond a reasonable doubt every element of the delinquent act(s) that (is) (are) charged. The law never imposes on the Juvenile the burden of

calling any witnesses or presenting any evidence. If the Juvenile presents witnesses (in response to the People's evidence or to establish any defense), the People may cross-examine them. The Prosecution may choose to present further evidence in response to any evidence presented by the Juvenile.

After all the evidence has been received, (I) (the Court) will give you final instructions on the law applicable to this particular case. These final instructions will replace the preliminary instructions that you will be given before the trial begins. Based upon the evidence presented, the final instructions may differ from the preliminary instructions. If there is any difference between the preliminary and final instructions, you must follow and be governed by the final instructions in deciding the case.

After you have received all the instructions on the law governing this case, each attorney may present a final argument to you. The People will first present (his) (her) closing argument. Thereafter, the Juvenile's attorney will make a closing argument. The People may respond to any statements made by the Juvenile's attorney. After arguments are concluded, the case is given to you for decision.

It is the right of an attorney to object when testimony or other evidence is offered that the attorney believes is not admissible.

When (I) (the Court) sustain(s) an objection to a question, the jurors must disregard the question and must draw no conclusion from the question nor guess what the witness would have said. If any answer has been given, the jurors must disregard it.

When (I) (the Court) sustain(s) an objection to any evidence or strikes any evidence, the jurors must disregard that evidence.

When (I) (the Court) overrule(s) an objection to

any evidence, the jurors must not give that evidence any more weight than if the objection had not been made. You should not be prejudiced against any party because that party's attorney makes an objection.

Legal arguments are occasionally required to be considered outside the presence of the jury. This may cause delay. All rulings (I) (the Court) (am) (is) required to make will be based solely on the law. You must not infer from any ruling or from anything (I) (the Court) say(s) during trial that (I) (the Court) hold(s) any views either for or against any party to this case.

During recesses and adjournments of court, you will be free to separate, to eat lunch, and to go home at the end of the day. During these times, you are not to discuss this case with one another or anyone else. Furthermore, you must not talk with any of the parties to this case, their attorneys, witnesses, or representatives of the media until after you have reached your verdict and have been discharged by the Court as jurors in this case.

We have a Bailiff, (*name*), and (he) (she) is here to take care of your needs during the course of this trial. Do not discuss this case with the Bailiff. If you have any personal problems or needs, take it up with (*name of Bailiff*) and (he) (she) will notify me.

#### Notes on Use

1. This instruction should be used rather than Instruction 1:7. See Notes on Use to Instruction 1:7.
2. Use whichever parenthesized words are appropriate.

#### Source and Authority

This instruction is supported by the authorities cited in paragraphs 1 and 2 of the Source and Authority to Instruction 40:1, and the Source and Authority to Instruction 1:7.

### 40:3 SUMMARY CLOSING INSTRUCTION

These instructions contain the law that will govern you in this case.

No one of these instructions states all of the law applicable, but all of them must be taken, read and considered together because they are connected with and related to each other as a whole.

You must not be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law should be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

Neither sympathy nor prejudice should influence you. You must not consider for any purpose what action the Court may take with respect to the juvenile as a result of your verdict. Such action is solely the responsibility of the Court.

The Court did not in any way and does not by these instructions express any opinions as to what has or has not been proved in the case, or as to what are or are not the facts of the case.

#### Notes on Use

This instruction should be used rather than Instruction 4:1, although the instructions are similar except for the additional fourth paragraph of this instruction. *See* Notes on Use to Instruction 4:1.

#### Source and Authority

This instruction is supported by the authorities cited in the Source and Authority to Instruction 4:1.

## CHAPTER 41. CHILDREN'S CODE— DEPENDENCY AND NEGLECT

- 41:1 Introductory Remarks to Jury Panel
- 41:2 General Outline of Trial Procedures to Jury
- 41:3 Explanation of Dependency and Neglect Proceedings
- 41:4 Statement of the Case and Requirements for Establishing  
Child Dependent and Neglected
- 41:5 Adjudication of No Fault
- 41:6 Abandonment—Defined
- 41:7 Proper Parental Care—Defined
- 41:8 Mistreatment or Abuse—Defined
- 41:9 Mistreatment or Abuse—Includes Emotional Abuse
- 41:10 Environment Injurious to Child's Welfare—Defined
- 41:11 Treatment of Other Child or Children
- 41:12 Custody Not Required
- 41:13 Run Away From Home—Defined
- 41:14 Dependent and Neglected Because of Pattern of Habitual  
Abuse—Elements
- 41:15 Pattern of Habitual Abuse—Defined
- 41:16 Prospective Harm
- 41:17 Special Verdict—Mechanics for Submitting
- 41:18 Special Verdict Form
- 41:19 Use of Present Tense—Dependency and Neglect

### 41:1 INTRODUCTORY REMARKS TO JURY PANEL

*(The remarks of the Court to the members of the jury panel at the commencement of the trial should be substantially as follows:)*

**Members of the jury, this is** *(insert appropriate description, e.g., "Courtroom A," "Division II," etc.)* **of the (Juvenile) (District) Court. My name is** *(insert name)*. **I am the judge assigned to preside in this case.**

**First, I want to tell you about the rules that will govern your conduct during your jury duty, beginning right now, even if you are not finally selected as jurors. If you are chosen as jurors, your job will be to**

decide this case based solely on the evidence presented during the trial and the instructions that I will give you. You will not be investigators or researchers, so do not attempt to gather any information about this case on your own. Do not read or do research about this case or the issues in the case from any other source, including the Internet. You may not use Google, Bing, Yahoo, or any other type of Internet search engine to learn about any person, place, or thing that is involved in this case. Do not read about this case in newspapers, magazines, or any other publications. Do not listen to podcasts or television or radio broadcasts about the trial. Do not consult dictionaries; medical, scientific, or technical publications; religious books or materials; or law books. I want to emphasize that you must not seek or receive any information about this case from the Internet, which includes all social networking sites, Google, Wikipedia, blogs, and other websites.

If you were to violate this rule by receiving outside information about the case, it could force me to declare a mistrial, meaning that the trial would have to start over, and all of the parties' work, my work, and your work on this case would be wasted.

Therefore, it is very important that you not receive outside information about this case, whether it comes from other people, from the media, from books or publications, or from the Internet. You are free to use the Internet, but only for purposes unrelated to this case. Do not search for or receive any information about the parties, the lawyers, the witnesses, the judge, the evidence, or any place or location mentioned. Do not research the law. Do not look up the meaning of any words or scientific or technical terms used. If necessary, I will give you definitions of words or terms.

Also, you are not allowed to visit any place(s) involved in this case. If you normally travel through

such a place, you should try to take a different route until I tell you that your jury service is completed. If you cannot take a different route, you must not stop or attempt to gather any information from that location.

Until I tell you that your jury service is complete, do not communicate about the case with anyone, including family and friends, whether in person, or by telephone, cell phone, smart phone, computer, Internet, or any Internet service. This means you must not email, text, instant message, Tweet, blog, or post information about this case, or about your experience as a juror on this case, on any social networking site, website, listserv, chat room, or blog.

When court is not in session, you may communicate about anything other than this case. You may tell others that you are on jury duty and that you cannot talk about this duty until your service is completed, and you may tell them the estimated schedule of your jury duty, but do not tell them anything else about the case. If anyone tries to communicate with you about anything concerning the case, you must stop the communication immediately and report it to the Bailiff, who will notify me.

(The Court) (I) will now introduce you to this case.

The case we are about to try is not a criminal or civil case, but a dependency and neglect case under the Colorado Children's Code. The party who started this case is the People of the State of Colorado, the Petitioner, who brought this case in the Interest of (*insert child's name*), who may be referred to by name or as the "child;" the (parent[s]) (guardian[s]) (custodian[s]) of the child (is) (are) (*name respondent[s]*) and may be referred to by name or as "respondent(s)." (*Name*), has been appointed by the Court as the child's guardian ad litem. (His)(her) job is to represent what

(he)(she) believes to be the best interests of the child, independent of the other parties' positions.

The case is based upon a petition that claims:  
*(insert the relevant portions of the petition).*

You should understand that these are only claims and that you should not consider the claims as evidence in the case.

The respondent(s) (has) (have) denied the claims made in the petition. The Petitioner has the burden of proving the facts claimed in the petition by a preponderance of the evidence. The purpose of this trial is to determine whether the claims made in the petition are true.

(The Court) (I) will now read you some of the instructions that may apply in this case. These are preliminary instructions about the law and may not be exactly the same as the final instructions about the law you will be given at the end of the case to use in your deliberations. If there is any difference between the preliminary and final instructions, you must follow and be governed by the final instructions in deciding the case. You should not be concerned about any difference between the preliminary instructions and the final instructions. *(Insert applicable jury instructions, such as the definition of the burden of proof and any applicable evidentiary standards.)*

There will be *(insert number)* jurors in this case. The jury will consider the evidence and reach a verdict with the help of legal instructions (the Court) (I) will give you at the end of the case.

The jury must determine what the facts are from the evidence that you hear and see during the trial.

You have a duty to be fair and impartial.

In this case, the parties are entitled to a jury trial.

**Trial by jury is part of our American system of justice. Each juror plays an equal and important part in this system. It is your duty to give this case your close attention, absolute fairness, and good judgment.**

**We estimate that this trial will last** *(insert number) days. (The Court may either at this time or later inquire whether there are any members of the jury panel who would be unable to serve during the trial if selected as jurors.)*

**In this case, it will not be necessary to keep the jurors together at noon or at night until the case is finally given to you for your determination.**

#### Notes on Use

1. This instruction should be used rather than Instruction 1:1 or Instruction 2:1. See Notes on Use to Instruction 1:1 and Instruction 2:1.

2. Use whichever parenthesized words are appropriate.

3. To facilitate the jury selection process in a dependency and neglect proceeding, at the outset of a case, the court must orient prospective jurors to the proceedings and inform them about their duties and service. C.R.C.P. 47. As part of this orientation, the court must explain the nature of the case, in plain and clear language, using either the parties' pattern jury instruction or a joint statement of factual information intended to provide a relevant context for the prospective jurors to respond to questions asked of them. **People in Interest of M.H-K.**, 2018 COA 178, ¶ 22, 433 P.3d 627 (quoting C.R.C.P. 47(a)(2)(IV) and C.R.C.P. 16(g)). On request, the court may allow counsel to present such information through brief non-argumentative statements. *Id.*; C.R.C.P. 47(a)(2)(IV). The imparted information and instructions should be clear and as neutral as possible. C.R.C.P. 47 cmt.

4. This instruction should not serve as one party's court-sponsored theory-of-the-case instruction. Thus, the court should not include long recitations of allegations from the petition in dependency and neglect as part of an introductory instruction. See **M.H-K.**, 2018 COA 178, ¶ 37.

5. Under section 19-3-505(1), C.R.S., "jurisdictional matters of the age and residence of the child shall be deemed admitted by or on behalf of the child unless specifically denied prior to the adjudicatory hearing."

6. While the statute refers to "neglected or dependent" children, *see, e.g.*, § 19-3-102, C.R.S., the more common language "dependency and neglect" has been used in these instructions.

7. Concerning the appointment and duties of a guardian ad litem,

see sections 19-1-111(1) and 19-3-203(1), C.R.S. A dependency and neglect case cannot remain open under the supervision of a guardian ad litem once the county department of human services is dismissed as a party. **People in Interest of E.D.**, 221 P.3d 65 (Colo. App. 2009).

8. A trial court has no authority to enter a dispositional order before adjudicating the child dependent and neglected. *See* § 19-3-507(1)(a), C.R.S.; **People in Interest of O.E.P.**, 654 P.2d 312 (Colo. 1982); **People in Interest of J.L.**, 121 P.3d 315 (Colo. App. 2005). The lack of an adjudicatory order, however, does not divest the court of jurisdiction, as long as there is an admission that the child is dependent and neglected. **People in Interest of N.D.V.**, 224 P.3d 410 (Colo. App. 2009).

9. A child may be adjudicated dependent and neglected only based on circumstances existing at the time of the adjudication. **People in Interest of S.X.M.**, 271 P.3d 1124, 1130 (Colo. App. 2011) (“The plain language of section 19-3-102(1)(b) and (c) suggests that the child’s status as a neglected or dependent child is to be determined at the time of the adjudication hearing.”); **People in Interest of A.E.L.**, 181 P.3d 1186 (Colo. App. 2008).

10. Notwithstanding mother’s no-fault admission, once the child was found not dependent and neglected as to the father, section 19-3-505(6), required the court to dismiss the petition, ending the court’s jurisdiction over the case. **People in Interest of A.H.**, 271 P.3d 1116 (Colo. App. 2011).

11. A juvenile court does not have subject-matter jurisdiction to adjudicate a child as dependent and neglected once the child reaches age eighteen. **People in Interest of M.C.S.**, 2014 COA 46, ¶ 17, 327 P.3d 360.

12. This instruction should be modified to reflect current communication methods and information-gathering technology.

### Source and Authority

1. The instruction is supported by C.R.J.P. 1 and C.R.C.P. 47(a). Under C.R.J.P. 1, proceedings under the Children’s Code are civil and generally are conducted according to Colorado Rules of Civil Procedure. C.R.C.P. 47(a) provides, “An orientation and examination shall be conducted to inform prospective jurors about their duties and service.” C.R.C.P. 47(a)(2)(IV) requires that the judge explain the “nature of the case” in “plain and clear language.” *See* **People in Interest of M.H-K.**, 2018 COA 178, ¶ 22, 433 P.3d 627.

2. Under section 19-3-202(2), C.R.S., the “petitioner, any respondent, or the guardian ad litem may demand a trial by jury of six persons . . . or the court, on its own motion, may order” one. *See also* **People in Interest of N.G.**, 2012 COA 131, ¶ 19, 303 P.3d 1207 (a parent “may demand a jury trial” requiring the state to prove allegations of

dependency or neglect); **People in Interest of A.M.**, 786 P.2d 476 (Colo. App. 1989) (discusses right to jury trial of one respondent parent in face of “no-fault” admissions of neglect made by other respondent parent).

3. Concerning the form and content of petitions, see section 19-3-502, C.R.S., and C.R.J.P. 4(a).

4. The “state is the exclusive party to bring neglect and dependency proceedings.” **McCall v. Dist. Court**, 651 P.2d 392, 394 (Colo. 1982). However, the district attorney is not authorized to represent the state in such proceedings. **H.B. v. Lake County Dist. Court**, 819 P.2d 499 (Colo. 1991); *see also* **L.G. v. People**, 890 P.2d 647 (Colo. 1995). A private person may request public authorities to take action, but may not bring a neglect and dependency proceeding on his or her own. **McCall**, 651 P.2d at 394. Though the state is the exclusive party to file a petition, once filed, the trial court is not required to dismiss the petition simply because the state for some reason has chosen not to pursue the proceedings. “[T]he child, through the guardian ad litem, is entitled to a determination of the merits, and the petition may not be dismissed over the objection of the guardian ad litem.” **People in Interest of R.E.**, 729 P.2d 1032, 1034 (Colo. App. 1986); *see also* **People in Interest of M.N.**, 950 P.2d 674 (Colo. App. 1997) (the State does not have exclusive authority to file a motion to terminate parent-child relationship, and the guardian ad litem was authorized to file such a motion).

5. “Adjudications of neglect or dependency are not made ‘as to’ the parents, but rather, relate only to the status of the child.” **People in Interest of P.D.S.**, 669 P.2d 627, 627–28 (Colo. App. 1983) (child properly adjudicated neglected and dependent though one parent blameless as to child’s condition); *accord* **People in Interest of U.S.**, 121 P.3d 326 (Colo. App. 2005).

6. The burden of proof for an adjudication in a dependency and neglect proceeding is by a preponderance of the evidence, § 19-3-505(1), (7), although the factual requirements necessary for the termination of parental rights under sections 19-3-602 and 19-3-604, C.R.S., must be proved by clear and convincing evidence. **People in Interest of A.M.D.**, 648 P.2d 625 (Colo. 1982) (citing and applying **Santosky v. Kramer**, 455 U.S. 745, 747–48 (1982) (“Before a State may sever completely and irrevocably the rights of parents in their natural child, [federal] due process requires that the State support its allegations by at least clear and convincing evidence.”)).

7. Applying the standard of preponderance of the evidence, rather than that of clear and convincing evidence, does not violate due process. **L.L. v. People**, 10 P.3d 1271 (Colo. 2000); **People in Interest of O.E.P.**, 654 P.2d at 317.

## 41:2 GENERAL OUTLINE OF TRIAL PROCEDURES TO JURY

I will now explain the procedure that is usually followed during a trial. Before the trial begins, I will orally give you some preliminary instructions to provide you with a framework for the evidence that will be presented. (You will also receive copies of these preliminary instructions.)

The attorneys will then have the opportunity to present opening statements. The purpose of opening statements is to give you an outline of each party's claims and defenses. You must remember, however, that what is said in opening statements and all other statements made by the attorneys are not evidence. Your verdict must be based upon the evidence in this case and the instructions regarding the law that govern this case. The evidence usually consists of the sworn testimony of witnesses, the exhibits that are received and any facts that are admitted or agreed to or are judicially noticed.

(Also, during the course of this trial, [the court] [the attorneys] will [make] [read] brief statements summarizing the evidence already presented [and outlining how this evidence relates to evidence that will be presented later in the trial]. These statements are not evidence and are only made for the purpose of assisting you in understanding this case.)

Once the trial begins, the petitioner's attorney will present evidence. The respondent's attorney and the guardian ad litem are permitted to cross-examine all witnesses presented by the petitioner. Upon the conclusion of petitioner's case, the guardian ad litem or respondent's attorney may offer evidence but are not required to do so. If the respondent or guardian ad litem presents witnesses, the other parties may cross-examine them. The petitioner's attorney may choose to present further evidence in response to any evidence presented by any of the other participants.

After all the evidence has been received, (I) (the Court) will give you final instructions on the law that apply to this particular case. These final instructions will replace the preliminary instructions that you will be given before the trial begins. Based upon the evidence presented, the final instructions may differ from the preliminary instructions. If there is any difference between the preliminary and final instructions, you must follow the final instructions in deciding the case.

After you have received all the instructions on the law governing this case, each attorney may present a final argument to you. Petitioner's attorney will first present (his) (her) closing argument. Thereafter, the respondent's attorney and the guardian ad litem will make their closing arguments. Petitioner's attorney may respond to any statements made by the other attorneys. After arguments are concluded, the case is given to you for decision.

It is the right of an attorney to object when testimony or other evidence is offered that the attorney believes is not admissible.

When (I) (the Court) sustain(s) an objection to a question, the jurors must disregard the question and must draw no conclusion from the question nor guess what the witness would have said. If any answer has been given, the jurors must disregard it.

When (I) (the Court) sustain(s) an objection to any evidence or strike(s) any evidence, the jurors must disregard that evidence.

When (I) (the Court) overrule(s) an objection to any evidence, the jurors must not give that evidence any more weight than if the objection had not been made. You should not be prejudiced against any party because that party's attorney makes an objection.

Legal arguments are occasionally required to be

considered outside the presence of the jury. This may cause delay. All rulings (I) (the Court) (am) (is) required to make will be based solely on the law. You must not infer from any ruling or from anything (I) (the Court) say(s) during trial that (I) (the Court) hold(s) any views either for or against any party to this case.

During recesses and adjournments of court, you will be free to separate, to eat lunch, and to go home at the end of the day. During these times, you are not to discuss this case with one another or anyone else. Furthermore, you must not talk with any of the parties to this case, their attorneys, witnesses, or representatives of the media until after you have reached your verdict and have been discharged by the Court as jurors in this case.

You may discuss the evidence during the trial, but only among yourselves and only in the jury room when all of you are present.

You must not, individually or as a group, form final opinions about any fact or about the outcome of this case until after you have heard and considered all of the evidence, the closing arguments, and the rest of the instructions I will give you on the law. Keep an open mind during the trial. Form your final opinions only after you have discussed this case as a group in the jury room at the end of the trial.

We have a Bailiff, (*name*), and (he) (she) is here to take care of your needs during the course of this trial. Do not discuss this case with the Bailiff. If you have any personal problems or needs, take it up with (*name of Bailiff*) and (he) (she) will notify me.

#### Notes on Use

1. This instruction should be used rather than Instruction 1:7. See Notes on Use to Instruction 1:7.
2. Use whichever parenthesized words are appropriate.

3. Concerning the appointment of a guardian ad litem, see sections 19-1-111(1) and 19-3-203(1), C.R.S.

### Source and Authority

This instruction is supported by the authorities cited in the first two paragraphs of the Source and Authority to Instruction 40:1, and the Source and Authority to Instruction 1:7.

## 41:3 EXPLANATION OF DEPENDENCY AND NEGLECT PROCEEDINGS

An action in dependency and neglect is a proceeding initiated by the State, through the department of social services. It is a proceeding to protect children and ensure that they have a safe and healthy environment, not to punish (parents) (guardians) (or) (legal custodians) or to find fault.

### Source and Authority

This instruction is supported by **People in Interest of J.G.**, 2016 CO 39, ¶ 37, 370 P.3d 1151; and **L.G. v. People**, 890 P.2d 647 (Colo. 1995).

**41:4 STATEMENT OF THE CASE AND  
REQUIREMENTS FOR ESTABLISHING  
CHILD DEPENDENT AND NEGLECTED**

(The Court) (I) will now instruct you as to the claims of the parties and the law governing the case. Please pay close attention to these instructions. You must all agree on your verdict, applying the law as you are now instructed to the facts as you find them to be.

The petitioner claims that *(name of child)* is dependent and neglected because: *(insert those allegations from the petition on which sufficient evidence has been introduced and which if established would constitute a legal basis for determining that the child is dependent and neglected).*

The respondent(s), *(name[s])*, (has) (have) denied these claims.

The guardian ad litem, *(name)*, claims *(insert appropriate description of the guardian's position).*

These are the issues you are to determine, but are not to be considered by you as evidence in the case (except for those facts which have been admitted or agreed to).

The claims made in the petition must be proved by a preponderance of the evidence and no inference that the claims have been proved should be drawn from the (filing of a petition) (appointment of a guardian ad litem to represent the best interest of the child) (or) (entry of a court order placing the temporary custody of the child with someone other than the parent[s] of the child).

Neither sympathy nor prejudice should influence you. It is the Court's responsibility to decide what action to take with respect to the child and the respondent[s] as a result of your verdict. You should not

**consider what the court might do in reaching your verdict.**

### Notes on Use

1. Use whichever parenthesized words and phrases are appropriate.
2. Use this instruction after the close of evidence rather than as a pre-adjudication introductory instruction. *See People in Interest of M.H-K.*, 2018 COA 178, ¶ 39, 433 P.3d 627. In instructing the jury on the statement of the case, the court should not merely read the petition in dependency and neglect, but must instead refer to the factual allegations that are supported by the evidence and that support the adjudication of the child as dependent and neglected. *Id.* at ¶¶ 41–42.
3. Use this instruction rather than any instruction in Chapter 2, and, because the matter of sympathy and prejudice is covered in the last paragraph of this instruction, Instruction 3:14 should not be given.
4. Note 1 of the Notes on Use to Instruction 2:1 is also applicable to this instruction.
5. For what constitutes dependency or neglect, see section 19-3-102, C.R.S.
6. A child may be found to be neglected and dependent only on one or more of the bases specified in section 19-3-102(1). *People in Interest of S.X.M.*, 271 P.3d 1124 (Colo. App. 2011); *see C.M. v. People*, 198 Colo. 436, 601 P.2d 1364 (1979).
7. When otherwise supported by sufficient evidence, a child may be found to be dependent and neglected even though the child has never been in the custody of his or her parents. *People in Interest of D.L.R.*, 638 P.2d 39 (Colo. 1981) (minor child placed at birth in the temporary custody of local department of social services); *People in Interest of T.T.*, 128 P.3d 328 (Colo. App. 2005) (child whose mother used drugs during pregnancy and never had custody).

### Source and Authority

This instruction is supported by C.R.C.P. 47(a)(2)(IV) and (V), and the fifth and sixth paragraphs of the Source and Authority to Instruction 41:1. This instruction was approved for use after the conclusion of the evidence in a dependency and neglect trial in *People in Interest of M.H-K.*, 2018 COA 178, ¶ 39, 433 P.3d 627.

**41:5 ADJUDICATION OF NO FAULT**

**You may find that the child is dependent and neglected even if you find that *[description of respondent]* is not at fault.**

**Notes on Use**

This instruction should be given when the case is based on a no-fault theory, including cases involving claims of injurious environment under section 19-3-102(1)(c), C.R.S., and cases involving claims that a child is homeless, without proper care, or not domiciled with his or her parent, guardian, or legal custodian through no fault of such parent, guardian, or legal custodian under section 19-3-102(1)(e), C.R.S.

**Source and Authority**

This instruction is supported by section 19-3-102, C.R.S.; **People in Interest of J.G.**, 2016 CO 39, ¶ 40, 370 P.3d 1151; and **People in Interest of P.D.S.**, 669 P.2d 627 (Colo. App. 1983).

**41:6 ABANDONMENT—DEFINED**

**Abandonment means the intentional and permanent giving up by a (parent) (guardian) (legal custodian) of all parental rights. Intent to abandon a child may be shown by words or conduct, or both.**

**Notes on Use**

1. Use whichever parenthesized words are appropriate.
2. This instruction should be given whenever Question 1 in Instructions 41:17 and 41:18 is submitted to the jury.
3. "When a child has been abandoned by its parents, a court may find that the child is dependent and neglected, notwithstanding the fact that the child may be currently receiving adequate care from other persons." **People in Interest of F.M.**, 44 Colo. App. 142, 144, 609 P.2d 1123, 1124 (1980).

**Source and Authority**

This instruction is supported by section 19-3-102(1)(a), C.R.S.; and 2 H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 21.7, at 634-37 (2d ed. 1987). *See also* **D.P.H. v. J.L.B.**, 260 P.3d 320, 324 (Colo. 2011) (in the stepparent adoption context "abandonment is the intention to permanently relinquish rights and responsibilities with regard to a child"); **Moreau v. Buchholz**, 124 Colo. 302, 236 P.2d 540 (1951); **In re J.A.V.**, 206 P.3d 467 (Colo. App. 2009) (defining abandonment in stepparent adoption context).

**41:7 PROPER PARENTAL CARE—DEFINED**

**Proper parental care means the minimum level of care or services and necessities that are required to prevent any serious threat to the child's health or welfare.**

**Notes on Use**

1. This instruction should be given whenever Question 3 in Instructions 41:17 and 41:18 is submitted to the jury.

2. Under section 19-3-103(1), C.R.S., with certain exceptions, “No child who in lieu of medical treatment is under treatment solely by spiritual means through prayer in accordance with a recognized method of religious healing shall, for that reason alone, be considered to have been neglected or dependent within the purview of this article.” When appropriate to the evidence in the case, this instruction must be modified to include any of the relevant provisions of subsections (1) and (2) of section 19-3-103, which do permit an adjudication in some circumstances as to a child under treatment by spiritual means. *See People in Interest of D.L.E.*, 645 P.2d 271, 276 (Colo. 1982) (analyzing under former statute and concluding, “where a minor suffers from a life-threatening medical condition due to a failure to comply with a program of medical treatment on religious grounds, section 114 permits a finding of dependency and neglect and does not violate the constitutional provisions protecting the free exercise of religion”).

3. The companion basis for finding a child is neglected or dependent under section 19-3-102(1)(d), C.R.S., because of the failure to provide “proper or necessary subsistence, education, medical care, or any other care necessary for his or her health, guidance, or well-being,” needs no further definition. Consequently, no definitional instruction for this basis has been provided when Question 5 in Instruction 41:17 and 41:18 is submitted to the jury.

**Source and Authority**

This instruction is supported by section 19-3-102(1)(b), and, in part, 2 H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 21.7 (2d ed. 1987). *See also People in Interest of S.G.L.*, 214 P.3d 580 (Colo. App. 2009) (father's failure to retrieve daughter for one and one-half to two hours after being informed child's mother arrested for DUI and arrival without a child restraint seat insufficient to support finding of failure to provide proper parental care); *People in Interest of T.T.*, 128 P.3d 328 (Colo. App. 2005) (child whose mother used drugs during pregnancy and who was never in his mother's custody could still be found to lack proper parental care); *People in Interest of C.R.*, 38 Colo. App. 252, 557 P.2d 1225 (1976) (lack of proper care of a non-abused child could reasonably be inferred from evidence of mistreat-

ment of other children).

**41:8 MISTREATMENT OR ABUSE—DEFINED**

**No standard instruction is recommended.**

**Note**

1. A child may be adjudicated dependent or neglected under section 19-3-102(1), C.R.S., if he or she has been subjected to abuse or mistreatment. The phrase “mistreatment or abuse,” as used in Question 2 of Instructions 41:17 and 41:18, is likely to be sufficiently self-defining and, therefore, no specific definition will be required. However, when either word is not sufficiently self-defining, particularly in light of section 18-6-401(1), C.R.S. (defining criminal child abuse), and section 19-1-103(1), C.R.S. (defining “abuse” and “child abuse or neglect” in specific factual situations), an appropriate instruction based on those provisions and any relevant case law should be given, if supported by sufficient evidence.

2. For cases discussing “abuse,” see **People v. D.A.K.**, 198 Colo. 11, 596 P.2d 747 (1979) (“mistreatment or abuse” includes emotional as well as physical abuse, and the phrase is not so vague or uncertain as to be unconstitutional); **People in Interest of C.R.**, 38 Colo. App. 252, 557 P.2d 1225 (mistreatment by another); **People in Interest of M.A.L.**, 37 Colo. App. 307, 592 P.2d 415 (1976) (when child sustained a non-accidental injury resulting from parent administering corporal punishment, the reasonableness of that punishment is a question for the trier of fact).

**41:9 MISTREATMENT OR ABUSE—INCLUDES  
EMOTIONAL ABUSE**

**The term “mistreatment or abuse” includes emotional as well as physical abuse.**

**Notes on Use**

This instruction should be given whenever Question 2 in Instructions 41:17 and 41:18 is submitted to the jury.

**Source and Authority**

This instruction is supported by **People v. D.A.K.**, 198 Colo. 11, 596 P.2d 747 (1979).

**41:10 ENVIRONMENT INJURIOUS TO CHILD'S WELFARE—DEFINED**

**Instruction deleted.**

**Notes**

1. In **People in Interest of J.G.**, 2016 CO 39, ¶ 40, 370 P.3d 1151, the Colorado Supreme Court held that section 19-3-102(1)(c), C.R.S., did not require proof of any parental fault to establish that a child is dependent and neglected when he or she is in an injurious environment. **J.G.**, ¶ 40 & n.10. The former Instruction 41:10 incorporated elements of parental fault by requiring findings that “[t]he environment is under the control of, or subject to change by, the child’s (parents) (guardian) (or) (legal custodian).” The former Instruction 41:10 also implied the need for a finding of parental fault in requiring proof that “[t]he environment is sufficiently injurious to the child’s welfare that any reasonable (parents) (guardian) (or) (legal custodian) would act to change it.” The court in **J.G.** noted that the propriety of Instruction 41:10 was “not before us in this case.” **J.G.**, ¶ 6, n.2. However, the Committee does not believe that the former Instruction 41:10 can be reconciled with **J.G.**’s holding and therefore deletes it.

2. Courts have explained that an injurious environment exists when a child is in a situation that is likely harmful to the child, and does not require proof of parental fault. **J.G.**, ¶ 26; **People in Interest of M.V.**, 2018 COA 163, ¶ 70, 432 P.3d 628.

**41:11 TREATMENT OF OTHER CHILD OR CHILDREN**

**You may consider** *[description of respondent]* **'s treatment of (another child) (other children) in determining whether the child in this case lacks proper parental care.**

**Notes on Use**

1. Use whichever parenthesized phrase is appropriate.
2. When using this instruction, instruction 41:7, defining "proper parental care," should also be given.

**Source and Authority**

This instruction is supported by **People in Interest of D.L.R.**, 638 P.2d 39 (Colo. 1981).

**41:12 CUSTODY NOT REQUIRED**

**You may find that the child is dependent and neglected even if [description of respondent] does not have custody of the child if you find that the child will lack proper parental care if returned to [description of respondent].**

**Notes on Use**

Use whichever parenthesized phrase is appropriate.

**Source and Authority**

This instruction is supported by **People v. D.A.K.**, 198 Colo. 11, 596 P.2d 747 (1979).

**41:13 RUN AWAY FROM HOME—DEFINED**

A child has run away from home when, without the permission of a (parent) (guardian) (or) (legal custodian), the child remains away from the place where he or she usually eats and sleeps for a sufficient period of time to demonstrate an unwillingness to return to that place.

**Notes on Use**

1. Use whichever parenthesized words are appropriate.
2. This instruction should be given whenever the phrase "run away from home" is used in Question 8 in Instructions 41:17 and 41:18 and that question is submitted to the jury.

**Source and Authority**

This instruction is supported by section 19-3-102(1)(f), C.R.S. (a "neglected or dependent" child includes a child who "has run away from home or is otherwise beyond the control of his or her parent, guardian, or legal custodian"). *See also People in Interest of C.C.G.*, 873 P.2d 41 (Colo. App. 1994).

**41:14 DEPENDENT AND NEGLECTED BECAUSE  
OF PATTERN OF HABITUAL ABUSE—  
ELEMENTS**

**A child is dependent or neglected based upon a pattern of habitual abuse when all of the following exist:**

**(1) The respondent (*insert name*) has subjected another child or other children to a pattern of habitual abuse; and**

**(2) [The other child(ren) (has) (have) been adjudicated as (a) dependent or neglected child(ren) based upon sexual or physical abuse by the respondent], or [a court has determined that the respondent's abuse or neglect has caused the death of another child]; and**

**(3) The pattern of habitual abuse in paragraph (1) and the type of abuse in paragraph (2) pose a current threat to the child, (*insert name of child*).**

**Notes on Use**

1. Use whichever parenthesized or bracketed words are appropriate.
2. This instruction should be given whenever Question 10 in Instructions 41:17 and 41:18 is submitted to the jury.
3. When this instruction is given, Instruction 41:15 must also be given.

**Source and Authority**

This instruction is supported by section 19-3-102(2), C.R.S.

**41:15 PATTERN OF HABITUAL ABUSE—DEFINED**

**“Pattern of habitual abuse” means two or more incidents of abuse to another child.**

**Notes on Use**

1. Section 19-3-102(2), C.R.S., does not provide a definition of what constitutes “an identifiable pattern of habitual abuse.” Without guidance from the legislature regarding what constitutes a “pattern,” the Committee has chosen to define it as “two or more incidents of abuse to another child.” The Committee believes that it is clear that a pattern cannot be established by the proof of a single incident. In the absence of any other direction that would indicate that a pattern requires the proof of more than two incidents, the Committee believes that the instruction is correct. However, the user is cautioned to make an independent determination of what constitutes a pattern before giving this instruction.

2. See the Notes on Use to Instruction 41:8 for a discussion of “abuse.”

3. This instruction should be given whenever Question 10 in Instructions 41:17 and 41:18 is submitted to the jury.

**Source and Authority**

This instruction is supported by section 19-3-102(2).

**41:16 PROSPECTIVE HARM**

Even in the absence of any past harm to the child, you may find that the child lacks proper parental care or that the child's environment is injurious to the child's welfare if you find that, based on *[description of respondent]'s (past conduct) (or) (current circumstances)*, the child is likely to be harmed in *[description of respondent]'s care*.

**Notes on Use**

1. Use whichever parenthesized phrase is appropriate.
2. In cases in which prospective harm is at issue, this instruction should be given whenever Question 3 or 4 in Instructions 41:17 and 41:18 is submitted to the jury.

**Source and Authority**

This instruction is supported by **People in Interest of D.L.R.**, 638 P.2d 39 (Colo. 1981).

**41:17 SPECIAL VERDICT—MECHANICS FOR  
SUBMITTING**

**You are instructed to answer the following question(s) that will be on a form for Special Verdict:**

**(QUESTION 1: Did the respondent, *[name]*, abandon *[name of child]*?)**

**(QUESTION 2: Did the respondent, *[name]*, [mistreat or abuse (*name of child*)] [or] [tolerate or allow another person to mistreat or abuse (*name of child*)] without taking lawful means to stop such mistreatment or abuse and prevent it from being repeated]?)**

**(QUESTION 3: Is *[name of child]* lacking proper parental care as a result of respondent, *[name]*'s, acts or failures to act?)**

**(QUESTION 4: Is *[name of child]*'s environment injurious to the child's welfare?)**

**(QUESTION 5: Is the respondent, *[name]*, failing or refusing to provide *[name of child]* with proper or necessary subsistence, education, medical care, or any other care necessary for [his] [her] health, guidance, or well-being?)**

**(QUESTION 6: Is *[name of child]* [homeless] [or] [without proper care], through no fault of the respondent, *[name]*?)**

**(QUESTION 7: Is *[name of child]* not living at home with the respondent, *[name]*, through no fault of the respondent?)**

**(QUESTION 8: Did *[name of child]* run away from home or is [he] [she] otherwise beyond the control of the respondent, *[name]*?)**

**(QUESTION 9: Did [name of child] test positive at birth for [a schedule I] [a schedule II] controlled substance[?]?)**

**(QUESTION 10: Is [name of child] dependent or neglected based upon a pattern of habitual abuse?)**

**Before you return the Special Verdict answering (this) (these) question(s), you must all agree upon the answer(s) to (each of) the question(s). Upon arriving at such agreement, your foreperson will insert (the) (each) answer in the verdict form and then he or she and all the jurors will sign it (upon completion of all answers).**

#### **Notes on Use**

1. The court should use only those numbered questions on which there is sufficient evidence, renumbering the questions as is necessary and using those bracketed or parenthesized words or phrases which are appropriate.

2. For instructions defining the operative terms in questions 1, 3, 4, 8 and 9 of this instruction, see Instructions 41:6, 41:7, 41:10, 41:13, 41:14, and 41:15, respectively.

3. If Question 9 is applicable, an additional instruction should be used defining a schedule I or schedule II controlled substance as is appropriate to the case. See § 19-3-102(1)(g), C.R.S.

4. Under Question 7, a non-custodial parent may not use his or her own admission that the child is not living with him or her through no fault of his or her own to have the child adjudicated neglected or dependent with respect to the custodial parent, although the literal language of the statute would seem to permit it. **People in Interest of T.R.W.**, 759 P.2d 768 (Colo. App. 1988) (construing previous version of section 19-3-102(1)(e)).

5. Note 4 of the Notes on Use to Instruction 4:4 is also applicable to this instruction, as is Note 4 of the Notes on Use to Instruction 4:15.

#### **Source and Authority**

This instruction is supported by section 19-3-102; and **People in Interest of J.G.**, 2016 CO 39, ¶¶ 41-42, 370 P.3d 1151. For a general discussion of the statute, see **People in Interest of S.S.T.**, 38 Colo. App. 110, 553 P.2d 82 (1976).

**41:18 SPECIAL VERDICT FORM**

**IN THE (JUVENILE) (DISTRICT) COURT IN  
AND FOR THE (CITY AND) COUNTY  
OF \_\_\_\_\_, STATE OF COLORADO**

**Action No. \_\_\_\_\_**

**THE PEOPLE OF  
THE  
STATE OF  
COLORADO**

**In the Interest of  
\_\_\_\_\_, a child,  
and Concerning  
\_\_\_\_\_,  
Respondent(s).**

)

)

)

)

)

**SPECIAL  
VERDICT**

**We, the jury, present our Answer(s) to the Question(s) submitted by the Court to which we have all agreed:**

**(QUESTION 1: Did the respondent, [name], abandon [name of child]? [yes or no]**

**ANSWER 1: \_\_\_\_\_)**

**(QUESTION 2: Did the respondent, [name], [mistreat or abuse (name of child)] [or] [tolerate or allow another person to mistreat or abuse (name of child)] without taking lawful means to stop such mistreatment or abuse and prevent it from being repeated]? [yes or no]**

**ANSWER 2: \_\_\_\_\_)**

**(QUESTION 3: Is [name of child] lacking proper parental care as a result of the respondent, [name's], acts or failures to act? [yes or no]**

**ANSWER 3: \_\_\_\_\_)**

**(QUESTION 4: Is *[name of child]*'s environment injurious to the child's{Enter} welfare? [yes or no]**

**ANSWER 4: \_\_\_\_\_)**

**(QUESTION 5: Is the respondent, *[name]*, failing or refusing to provide *[name of child]* proper or necessary subsistence, education, medical care, or any other care necessary to [his] [her] health, guidance, or well-being? [yes or no]**

**ANSWER 5: \_\_\_\_\_)**

**(QUESTION 6: Is *[name of child]* [homeless] [or] [without proper care], through no fault of the respondent, *[name]*? [yes or no]**

**ANSWER 6: \_\_\_\_\_)**

**(QUESTION 7: Is *[name of child]* not living at home with the respondent, *[name]*, through no fault of the respondent? [yes or no]**

**ANSWER 7: \_\_\_\_\_)**

**(QUESTION 8: Did *[name of child]* run away from home or is [he] [she] otherwise beyond the control of the respondent, *[name]*? [yes or no]**

**ANSWER 8: \_\_\_\_\_)**

**(QUESTION 9: Did *[name of child]* test positive at birth for a [schedule I] [schedule II] controlled substance? [yes or no]**

**ANSWER 9: \_\_\_\_\_)**

**(QUESTION 10: Is *[name of child]* dependent or neglected based upon a pattern of habitual abuse? [yes or no]**

**ANSWER 10: \_\_\_\_\_)**

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**Foreperson**

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**Notes on Use**

See the Notes on Use to Instruction 41:17.

**Source and Authority**

This instruction is supported by the authority cited in the Source and Authority to Instruction 41:17.

## 41:19 USE OF PRESENT TENSE—DEPENDENCY AND NEGLECT

A finding of dependency and neglect may be based on evidence that the child was subjected to neglect or abuse in the past (and will likely be neglected or abused in the future, if returned to the parent's care). The present tense as used in these instructions and verdict forms includes the future tense.

### Notes on Use

1. This instruction should be given in dependency and neglect cases if the court concludes that the jury may be confused by the instructions and verdict forms use of present tense because there is evidence that, at the time of the hearing, "the child has been removed from harm and is doing well." **People in Interest of S.X.M.**, 271 P.3d 1124, 1130 (Colo. App. 2011).

2. Use parenthesized words as appropriate.

### Source and Authority

This instruction is supported by **People in Interest of S.X.M.**, 271 P.3d at 1130–31.

# Table of Laws and Rules

## UNITED STATES CONSTITUTION

	This work Instr. No.		This work Instr. No.
8-43-304(1).....	25:2	Amend IV.....	21:11

## UNITED STATES CODE ANNOTATED

9 U.S.C.A. Sec.	This work Instr. No.	42 U.S.C.A. Sec.	This work Instr. No.
1-16 .....	25:4	14501-05 .....	6:1, 9:1
18 U.S.C.A. Sec.	This work Instr. No.	14503 .....	6:1
2511(2)(d) .....	28:1	14503(a) .....	6:1
2520 .....	28:1	14503(f) .....	5:4
29 U.S.C.A. Sec.	This work Instr. No.	14503(f)(1).....	5:4
621 to -34 .....	31:9	14504 .....	6:1
1003(b) .....	25:2	14501 to 14505 .....	5:4, 15:1
2601 to -654 .....	31:12	45 U.S.C.A. Sec.	This work Instr. No.
151 to 169.....	23:1	51 to 60 .....	9:22
651 to 678.....	9:14	47 U.S.C.A. Sec.	This work Instr. No.
1001 to 1003 .....	25:2	227 .....	29:1
42 U.S.C.A. Sec.	This work Instr. No.	230(c)(1).....	22:20
1983.....	17:1	230(f)(3).....	22:20

## CODE OF FEDERAL REGULATIONS

29 C.F.R. Sec.	This work Instr. No.
2510.3-1(j).....	25:2

# COLORADO CONSTITUTION

	This work Instr. No.		This work Instr. No.
Art. II, § 10 .....	22:16	Art. II, § 15 .....	36:1

# COLORADO REVISED STATUTES

Sec.	This work Instr. No.	Sec.	This work Instr. No.
2-4-401(6) .....	6:2, 7:1, 7:2	4-2-721.....	30:18
4-1-201(3) .....	30:1	4-2-725(1).....	30:26
4-1-201(10).....	14:16	4-3-604.....	30:27
4-1-202 .....	14:8, 14:15	4-4-405 .....	8:16
4-1-205.....	14:15	5-12-101(1)(b) .....	6:12
4-1-207.....	30:28	5-12-102(1)(a).....	6:11, 25:9, 30:49
4-1-303(b)-(c).....	14:11, 14:16	5-12-102(1)(b) .....	6:11
4-2-104.....	14:10	5-12-102(3).....	30:49
4-2-106(1) .....	14:8	5-16-113.....	28:1
4-2-204 to 2-206.....	30:3	6-1-105 .....	25:9
4-2-204(3) .....	30:1	6-1-105(1) .....	29:2, 29:3
4-2-205 .....	30:3, 30:7	6-1-105(3) .....	29:1
4-2-206 .....	30:6	6-1-106 .....	29:1
4-2-207 .....	30:6	6-1-113(1) .....	29:1
4-2-209 .....	30:8, 30:24, 30:25, 30:27, 30:28	6-1-113(2)(a)(I) .....	29:5
4-2-302.....	30:20	6-1-113(2)(a)(II) .....	29:5
4-2-313.....	14:9	6-1-113(2)(a)(III) .....	29:6
4-2-314.....	14:10, 14:13, 14:14	6-1-113(2)(b).....	15:18, 25:9, 29:5
4-2-314(2)(c).....	14:12	6-1-113(2.3) .....	29:6
4-2-314(3) .....	14:11	6-1-115 .....	29:1
4-2-315.....	14:13, 14:14	6-1-702(1)(c).....	29:1
4-2-316(1) .....	14:9	6-1-709 .....	29:5
4-2-316(2).....	14:16	6-6.5-101(1) .....	30:54
4-2-317.....	14:16	7-42-108.....	9:1
4-2-317(c) .....	14:13	7-56-504.....	24:1
4-2-318 .....	14:8, 14:11	7-60-106(1) .....	7:3
4-2-605 to 4-2-608 .....	30:25	7-60-107 .....	7:3
4-2-607, Comment 4 & 5 .....	14:8	7-61-101 to -130 .....	7:3
4-2-607(3) .....	14:8, 14:15	7-62-101 to -110 .....	7:3
4-2-610.....	30:13	7-63-101 to -116 .....	7:3
4-2-611.....	30:13	7-64-101(18) .....	7:3
4-2-613 to 4-2-616 .....	30:23	7-64-202(1) .....	7:3
4-2-714.....	14:8	8-2-104 .....	19:1
4-2-715.....	14:8, 30:39	8-2-113(3) .....	30:40
4-2-715(2)(b).....	14:8	8-2-114.....	22:18
4-2-718.....	30:40	8-2-201 to 8-2-204.....	10:3
4-2-719.....	30:39	8-4-101 to -123 .....	8:4
4-2-719(3) .....	14:8	8-4-109 .....	31:7
4-2-720.....	30:25, 30:27, 30:28	8-5-101 to -105 .....	8:4

COLORADO REVISED STATUTES—Continued

Sec.	This work Instr. No.	Sec.	This work Instr. No.
8-12-101 to 8-12-117 .....	9:14	12-61-119 .....	30:56
8-40-101 to 8-47-209..	12:1, 12:2, 12:3	12-61-201 .....	30:56
8-40-101 to -302 .....	8:4	12-61-202 .....	30:56
8-70-101 to -143 .....	8:4	12-61-203 .....	30:56
10-1-101 .....	25:1, 25:8	12-61-803(2).....	26:2
10-1-135 .....	6:1	12-61-807.....	19:1, 19:5
10-2-416 .....	8:16, 8:17	13-15-111.5 .....	23:6, 25:9
10-2-416.5 .....	8:16, 8:17	13-16-122(1)(h).....	29:5
10-2-704(1)(a) .....	26:2	13-17-202 .....	30:5
10-3-1104(1)(h)(II).....	25:8	13-17-101 to 13-17-106.....	25:2
10-3-1104(1)(h)(I) through (XIV) .	25:6	13-20-60 .....	15:26
10-3-1104(1)(h)(V).....	25:8	13-20-101(1) .....	5:4, 6:1
10-3-1104(1)(h)(I) to (XIV) .....	25:5	13-20-401 to -403 .....	15:10
10-3-1113(1) .....	25:5	13-20-403 .....	15:8
10-3-1113(2) .....	25:1	13-20-601 .....	15:21
10-3-1113(3) .....	25:1, 25:2, 25:7	13-20-602 ....	15:1, 15:2, 15:11, 15:21, 15:26
10-3-1113(4) .....	25:5, 25:6	13-20-602(1).....	15:1
10-3-1113(1) to (3).....	25:8	13-20-801 through 13-20-808.....	9:1
10-3-1115 .	25:1, 25:2, 25:3, 25:5, 25:7, 25:9, 25:10	13-20-802.5(1).....	30:54
10-3-1115(1)(b)(I).....	25:4	13-20-808(b)(II) .....	25:1
10-3-1116 .	25:1, 25:2, 25:3, 25:5, 25:7, 25:9	13-20-801 to 13-20-808 .....	6:1, 6:12
10-3-1116(1)...	25:1, 25:2, 25:8, 25:10, 25:11	13-21-101 .....	25:9
10-3-1116(3) .....	25:4	13-21-101(1).....	6:1
10-3-1116(4) .....	25:4	13-21-101(a).....	25:2
10-3-1115 and 10-3-1116 .....	25:4	13-21-102 .....	5:4, 25:11
10-4-104 .....	30:21	13-21-102(1)(b).....	9:30
10-4-109.....	25:2	13-21-102.5 ....	5:4, 6:1A, 6:2, 9:28B, 15:14, 15:15, 28:14
10-4-517.....	25:2	13-21-102.5(2)(b) .....	25:9
10-4-609 .....	6:1, 25:2	13-21-102.5(3) .....	3:2
10-4-708(1) .....	5:4	13-21-102.5(3)(a) .....	6:1, 14:30
10-4-708(1.8) .....	25:2	13-21-102.5(3)(a) and (b) .....	14:30A
11-51-501(1)(b) .....	19:4	13-21-102.5(3)(b).....	6:1, 6:6, 14:30
11-51-604(4).....	19:4	13-21-105 .....	9:7A
11-58-107 .....	9:1	13-21-106 .....	22:18
12-36-134 .....	8:22	13-21-106.5 .....	5:4, 23:1
12-36-134(7).....	15:1	13-21-108 ..	8:22, 9:1, 9:10, 15:7, 15:9, 20:1, 20:5
12-36.5-203(1).....	15:1	13-21-108(1).....	15:1
12-36.5-101 to 12-36.5-203 .....	15:1	13-21-108.1.....	9:1
12-37-109(1)(a) .....	15:2	13-21-108.2 .....	9:1, 15:1
12-47-801.....	9:1	13-21-108.3 .....	9:1
12-47-801(4)(a) .....	23:1	13-21-108.5 .....	9:1
12-61-101(2)(b)(XIV) .....	30:56	13-21-108.7 .....	9:1
12-61-102 .....	30:56	13-21-109 .....	19:1
12-61-103(2) .....	30:56	13-21-111 .....	4:20, 6:5, 9:1, 9:6, 9:22, 9:27, 9:28B, 9:31, 9:32, 10:1,
12-61-117 .....	30:56		

## COLORADO REVISED STATUTES—Continued

Sec.	This work Instr. No.	Sec.	This work Instr. No.
	10:2, 10:3, 14:29	13-21-203(1)(a) . . . . .	6:3, 10:3
13-21-111.5 . . . . .	4:15, 4:20, 6:1, 6:8, 9:1, 9:22, 9:25, 9:26, 9:27, 9:28, 9:28B, 9:29, 10:3, 12:1, 12:2, 12:3, 12:4, 12:6, 14:30, 14:30A, 14:31, 14:31A, 14:31B, 14:32, 14:32A, 14:32B, 14:33, 14:33A, 14:33B, 15:1, 15:10, 17:1, 17:10, 18:1, 19:1, 19:2, 20:1, 20:5, 21:1, 22:1, 22:2, 22:4, 22:5, 23:1, 24:1, 25:1, 25:2, 26:1, 28:1, 28:4, 28:5	13-21-203.5 . . . . .	10:3
13-21-111.5(2) . . . . .	9:19, 9:20	13-21-203.7 . . . . .	10:3
13-21-111.5(3)(b). 2:1, 9:19, 9:20, 9:24, 9:28, 9:28A, 15:14		13-21-401(1) . . . . .	14:1, 14:2, 14:5, 14:8, 14:22
13-21-111.5(4) . . . . .	27:1	13-21-401(2) . . . . .	14:3, 14:4, 14:5
13-21-111.5(5) . . . . .	4:20	13-21-402 . . . . .	14:8
13-21-111.6 . . . . .	6:1, 10:3	13-21-402(1) . . . . .	14:1
13-21-111.7 . . . . .	9:6, 9:31	13-21-402(2) . . . . .	14:2, 14:5
13-21-113(1) . . . . .	9:1	13-21-402.5 . . . . .	14:27
13-21-113.3 . . . . .	9:1	13-21-403(1) . . . . .	14:5A
13-21-114 . . . . .	9:10	13-21-403(2) . . . . .	14:5
13-21-115 . . . . .	9:1, 9:14, 12:9, 12:10, 12:11, 12:12, 12:16, 12:18, 13:1, 13:3, 13:5	13-21-403(3) . . . . .	14:5B
13-21-115(2) . . . . .	12:4, 12:5	13-21-403(4) . . . . .	14:5
13-21-115(3)(a) . . . . .	12:1, 12:2	13-21-406 . . . . .	9:6, 14:25, 14:28, 14:29, 14:30, 14:30A, 14:31, 14:31A, 14:31B, 14:32, 14:32A, 14:32B, 14:33, 14:33A, 14:33B
13-21-115(3)(c) . . . . .	12:3	13-21-406(4) . . . . .	9:22
13-21-115.5 . . . . .	9:1, 12:2, 12:3	13-21-801 to -13 . . . . .	6:1
13-21-115.5(4) . . . . .	15:1	13-21-804(1) . . . . .	5:4
13-21-115.6 . . . . .	9:1	13-21-804(2)(a) . . . . .	5:4
13-21-116(2) . . . . .	9:10	13-21-804(2)(b) . . . . .	5:4
13-21-116(2)(a) . . . . .	9:1	13-21-806(1) . . . . .	9:22
13-21-116(2)(b) . . . . .	9:1	13-21-201 to 13-21-204 . . . . .	6:1, 10:3
13-21-116(2.5)(a) . . . . .	9:1	13-21-401 to 13-21-406 . . . . .	14:1
13-21-117 . . . . .	9:1, 15:1	13-21-801 to 13-21-813 . . . . .	3:2, 5:4, 9:22
13-21-117.5 . . . . .	9:1	13-22-101 . . . . .	6:2
13-21-117.5(4) . . . . .	9:1	13-22-101(1) . . . . .	6:4
13-21-117.5(6) . . . . .	9:1	13-22-101(1)(a) . . . . .	30:21
13-21-117.7 . . . . .	9:1	13-22-101(1)(c) . . . . .	7:1
13-21-119 . . . . .	9:1, 13:1	13-22-101(1)(d) . . . . .	7:1
13-21-120 . . . . .	9:1, 9:22, 9:31	13-22-101 to -106 . . . . .	15:8
13-21-121 . . . . .	9:1	13-22-107(1)(a)(I)-(V) . . . . .	9:1
13-21-124 . . . . .	13:1	13-25-102 . . . . .	5:5
13-21-124(1)(d) . . . . .	13:4	13-25-125 . . . . .	22:16, 22:26
13-21-124(2) . . . . .	13:3, 13:5	13-25-125.5 . . . . .	22:7
13-21-201(2) . . . . .	10:3	13-25-127 . . . . .	3:1, 3:2, 5:4, 19:1
13-21-202 . . . . .	10:1, 10:3	13-25-127(1) . . . . .	3:6, 30:7, 34:6, 35:1, 35:2
13-21-203(3)-(5) . . . . .	5:4, 6:1	13-31-102.5(4) . . . . .	5:4
		13-50.5-101 to -106 . . . . .	8:22
		13-50.5-105(1)(b) . . . . .	9:27
		13-50.5-101 to 13-50.5-106 . . . . .	6:1, 9:27
		13-64-102(2) . . . . .	15:14
		13-64-102(2)(b) . . . . .	15:15
		13-64-202(3) . . . . .	15:14
		13-64-202(4) . . . . .	15:14

## COLORADO REVISED STATUTES—Continued

Sec.	This work Instr. No.	Sec.	This work Instr. No.
13-64-202(6) .....	15:15	15-11-505(1) .....	34:4
13-64-202(7) .....	15:16	15-11-506 .....	34:2, 34:6
13-64-203 .....	15:14	15-11-507 .....	34:2
13-64-203(1) .....	15:16	15-11-507(1) .....	34:8
13-64-204 .....	4:20, 15:15	15-11-507(1)(b) .....	34:9
13-64-204(2) .....	15:17	15-11-508 .....	34:8
13-64-205(1)(d) .....	15:15, 15:16	15-11-509 .....	34:8
13-64-205(1)(f) .....	15:16	15-11-513 .....	34:2, 34:6, 34:7
13-64-205(d) .....	4:20	15-11-803(1)(b) .....	10:3
13-64-207(1) .....	15:14	15-11-803(7) .....	10:3
13-64-302 .....	6:1	15-11-502 to 15-11-504 .....	34:1
13-64-302(1)(b) .....	15:15	15-11-1001 to 15-11-1011 .....	34:2
13-64-302(1)(c) .....	15:15	15-12-402(3) .....	34:2, 34:6, 34:8
13-64-302(2) .....	15:14	15-12-406(1)(a) .....	34:5
13-64-302.5 .....	5:4, 15:14	15-12-407 .....	34:1, 34:2, 34:5, 34:6, 34:7, 34:9, 34:11, 34:14, 34:15, 34:16, 34:20
13-64-401 .....	15:1	15-14-503 to -509 .....	8:9
13-64-502(1) .....	15:1	15-14-505(7) .....	15:14
13-64-201 to 13-64-213 .....	15:15	15-17-101(1) .....	34:16
13-64-203 to 13-64-205 .....	15:14	15-17-101(2)(b) .....	34:16
13-71-105(2) .....	1:2	15-18-101 to -112 .....	8:9
13-80-101(1)(a) .....	30:26	15-18.5-101 to -105 .....	8:9
13-80-102 .....	25:2, 28:12	15-22-101 to 15-22-112 .....	10:3
13-80-103(1)(a) .....	22:23	16-1-104(18) .....	21:15
13-80-103(1)(d) .....	5:4, 25:10	16-2-111 .....	21:19
13-80-108 .....	30:26	16-2-112 .....	21:19
13-80-108(1) .....	22:23, 32:4	16-2.5-101 to 16-2.5-151 ...	21:7, 21:8, 21:11, 21:15
13-80-119 .....	9:1, 20:5	16-3-101 .....	21:12
13-90-117 .....	1:21, 1:22	16-3-102 .....	21:11, 21:14
13-90-117.5 .....	1:21	16-3-102(b) .....	21:11
13-90-207 .....	1:22	16-3-102(c) .....	21:11
13-90-201 to 13-90-210 .....	1:22	16-3-103 .....	21:11
14-2-209 .....	6:5	16-3-103(1) .....	21:7, 21:12
14-2-309 .....	19:10	16-3-104 .....	21:11
14-10-115(13) .....	7:2	16-3-104(2) .....	21:14
14-10-128.1(7) .....	9:1	16-3-104(3) .....	21:19
15-1-103(2) .....	26:2	16-3-106 .....	21:11, 21:14, 21:15
15-10-306 .....	34:1	16-3-108 .....	21:15, 21:19
15-10-306(1) .....	34:2, 34:6	16-3-110 .....	21:14
15-11-204 .....	19:10	16-3-110(2) .....	21:11
15-11-501 .....	34:11	16-3-201 .....	21:10, 21:11
15-11-502(1) .....	34:1, 34:2	16-3-202 .....	21:10
15-11-502(2) .....	34:5, 34:6	16-3-203 .....	22:18
15-11-502(3) .....	34:7	16-5-205 .....	21:15
15-11-502(4) .....	34:3	16-10-103(1)(k) .....	8:4
15-11-503 .....	34:2, 34:6	18-1-501(5) .....	32:5
15-11-503(1) .....	34:1		
15-11-504 .....	34:5		

## COLORADO REVISED STATUTES—Continued

Sec.	This work Instr. No.	Sec.	This work Instr. No.
18-1-501(6) .....	32:5	19-3-203(1) .....	41:1, 41:2
18-1-501(8) .....	9:30	19-3-304(1) .....	15:1
18-1-504(2) .....	9:16	19-3-309 .....	15:1
18-1-702 .....	9:15	19-3-502 .....	41:1
18-1-704 .....	20:12, 20:13	19-3-505(1) .....	41:1
18-1-704.5 .....	20:13, 20:14, 20:15	19-3-507(1)(a) .....	41:1
18-1-704.5(1) .....	9:1	19-3-602 .....	41:1
18-1-704.5(2) .....	9:1	19-3-604 .....	41:1
18-1-704.5(4) .....	9:1	19-4-105(2) .....	3:6
18-1-707 .....	21:12	22-63-203(3) .....	31:8
18-1-707(4) .....	21:13	22-63-301 .....	31:6
18-1-801 .....	9:9, 9:14	24-10-103(5) .....	12:15
18-1-901(3)(p) .....	13:1, 13:4	24-10-103(1.3) .....	12:15
18-1-701 to 18-1-709 .....	9:15	24-10-105 .....	9:1, 22:1
18-2-101 .....	21:10	24-10-106 .....	22:1
18-4-401 .....	21:7, 32:1	24-10-106(1) .....	5:4, 30:10
18-4-401(1) .....	32:4	24-10-106(1)(c) .....	12:15
18-4-401(1.5) .....	32:4	24-10-106(1)(d) .....	12:15
18-4-405 .....	32:6, 32:7	24-10-106(1)(e) .....	12:15
18-4-406 .....	21:7	24-10-106(1)(f) .....	12:15
18-4-407 .....	21:7, 22:18	24-10-106(1)(g) .....	12:15
18-4-417(2)(b) .....	21:7	24-10-106(2) .....	9:1
18-6-401(1) .....	41:8	24-10-106(3) .....	9:1
18-8-111(1)(b) .....	9:14	24-10-106.5 .....	9:1
18-8-501 to 18-8-509 .....	1:21	24-10-107 .....	12:15
18-9-303(1)(a) .....	28:1	24-10-108 .....	12:15, 22:1
19-1-103(1) .....	41:8	24-10-109 .....	17:1
19-1-103(2) .....	40:1	24-10-109(2)(e) .....	6:1
19-1-105 .....	40:1	24-10-110(1)(a) .....	15:1
19-1-111(1) .....	41:1, 41:2	24-10-114 .....	6:1
19-2-107(2) .....	40:1	24-10-114(1)(a) .....	10:3
19-2-502 ....	21:7, 21:10, 21:11, 21:19	24-10-114(4) ...	5:4, 22:27, 23:1, 28:15
19-2-503 .....	21:10, 21:11, 21:19	24-10-118(2) .....	9:1
19-2-513 .....	40:1	24-10-118(2)(a) .....	23:2
19-2-601(3)(a) .....	40:1	24-10-118(5) ...	5:4, 22:27, 23:1, 28:15
19-2-805 .....	40:1	24-10-101 to 24-10-120 ....	10:3, 12:15
19-3-102 .....	41:1, 41:4, 41:5	24-12-101 .	1:19, 1:20, 1:21, 1:22, 1:23
19-3-102(1) .....	41:8	24-18-103 .....	26:2
19-3-102(1)(a) .....	41:6	24-33.5-1505 .....	9:1
19-3-102(1)(c) .....	41:5, 41:10	24-34-401 to -403 .....	8:4
19-3-102(1)(d) .....	41:7	24-34-402 .....	9:2, 23:1
19-3-102(1)(e) .....	41:5	25-1-122(3) .....	22:18
19-3-102(1)(f) .....	41:13	25-3-103.7 .....	15:1
19-3-102(1)(g) .....	41:17	25-5-403(1)(a) .....	14:19
19-3-102(2) .....	41:14, 41:15	25-5-701 to 25-5-720 .....	9:7, 9:14
19-3-103(1) .....	41:7	27-65-102(9) .....	35:4
19-3-202(2) .....	41:1	27-65-102(4.5) .....	35:5

TABLE OF LAWS AND RULES

COLORADO REVISED STATUTES—Continued

Sec.	This work Instr. No.	Sec.	This work Instr. No.
27-65-102(11.5) .....	35:1, 35:2, 35:3	38-1-115(2) .....	36:1
27-65-103(4) to (8) .....	35:1, 35:2	38-1-115(3) .....	36:11
27-65-105 .....	35:1	38-1-117 .....	36:1
27-65-106(1) .....	35:1	38-1-118 .....	36:8
27-65-106(6) .....	35:1	38-1-101 to 38-1-122 .....	36:1
27-65-107 .....	35:1	38-8-101 to 38-8-112 .....	5:4
27-65-107(1)(a) .....	35:1	38-10-124(3) .....	30:7
27-65-107(1)(b) .....	35:1	38-12-503 .....	12:8
27-65-107(1)(c) .....	35:1	38-12-501 to 38-12-511 .....	12:8
27-65-109 .....	35:2	38-33.3-303(2)(b) .....	9:1
27-65-109(1)(a) .....	35:2	40-30-103 .....	9:7A
27-65-109(1)(b) .....	35:2	42-2-112(3) .....	9:1
27-65-109(1)(c) .....	35:2	42-4-237(2) .....	5:3
27-65-109(4) .....	35:2	42-4-237(7) .....	5:2, 14:1, 14:8, 14:17
27-65-111(1) .....	35:1, 35:2	42-4-805 .....	11:3
27-65-111(2) .....	3:15, 35:6	42-4-807 .....	9:22
27-65-127(4)(c) .....	35:8	42-4-808 .....	9:22
33-41-103(2)(a) .....	6:1	42-4-808(1) .....	9:22
33-41-101 to 33-41-106 .....	12:1	42-4-1010 .....	11:10
33-44-101, et seq. ....	9:1	42-4-1013 .....	11:10
33-44-109(2) .....	3:6	42-4-1101(1) .....	11:8
33-44-113 .....	6:1, 6:3	42-4-1301(1) .....	11:14
33-44-101 to 33-44-114 ..	5:4, 6:3, 9:7, 9:14, 10:3	42-4-1301(2) .....	11:14
34-45-101 .....	18:1	42-4-1412 .....	11:3
35-12-101 to 35-12-120 .....	14:19	42-4-1707 .....	21:19
37-87-104 .....	9:1	42-4-701 to 42-4-713 .....	11:2
37-87-115 .....	9:1	42-4-801 to 42-4-803 .....	11:3, 11:4
38-1-101(2)(a) .....	36:1	42-4-805 to 42-4-808 .....	11:4
38-1-105(1) .....	36:1	42-4-1001 to 42-4-1003 .....	11:10
38-1-105(2) .....	36:1, 36:11	42-4-1005 to 42-4-1007 .....	11:10
38-1-106 .....	36:1, 36:11	42-6-202(5) .....	19:1
38-1-114(1) .....	36:2	42-6-204 .....	19:1
38-1-114(2)(b) .....	36:2	42-10-101 to 42-10-107 .....	14:8
38-1-114(2)(c) .....	36:4	107 .....	36:11
38-1-115(1) .....	36:4	118(1)(d) .....	6:1
38-1-115(1)(b) .....	36:3	203.5 .....	6:1
		Title 32, Art. 9 .....	36:2

COLORADO SESSION LAWS

Pub. L. No.	This work Instr. No.
Ch 240, § 12-36-134 .....	8:22

# COLORADO RULES OF APPELLATE PROCEDURE

Rule	This work Instr. No.
35(f).....	30:4, 32:1, 32:2, 32:3

# COLORADO RULES OF CIVIL PROCEDURE

Rule	This work Instr. No.	Rule	This work Instr. No.
8(a) .....	6:1	47(p) .....	4:14
8(c) .....	5:2, 9:4, 9:23, 22:26, 30:19, 30:20, 30:26, 30:27, 30:28, 34:5	47(q) .....	4:2, 4:4
9(c) ...	25:2, 30:10, 30:12, 30:15, 30:46	47(r) & (s) .....	4:2
9(g).....	22:14, 30:39	47(s) .....	4:3, 4:4
12(b)(1) .....	12:15	47(u).....	1:17, 1:19
14 .....	2:3	48 .....	2:1, 4:2, 4:15, 9:26A, 9:27A, 9:27C, 9:28A, 9:29A, 34:1, 35:1, 35:2
15(c) .....	22:23	49 .....	4:15, 4:16, 4:20, 34:20
16(f)(3)(I).....	1:14	49(b).....	4:15, 4:16
16(f)(3)(VI)(B) .....	3:17	52 .....	29:5
16(f)(3)(VI)(C) .....	1:9	80(c).....	3:11
16(g).....	41:1	98 .....	32:6
17(c) .....	7:1	106 .....	22:1
18(a) .....	6:14	316(e).....	1:9
23 .....	29:1	317(c).....	7:1
26 .....	5:4	318(a).....	6:14
32(a) .....	3:10	347(q)-(s) .....	4:4
35 .....	25:2	347(a).....	1:1, 1:2, 1:3, 1:19
36(b).....	1:13, 1:14	347(a)(2)(IV) ....	1:1, 2:1, 2:2, 2:3, 2:5, 2:6
38(a) .....	30:30, 31:4	347(a)(5).....	1:7, 1:10
47 .....	1:1, 1:2, 1:9, 2:1, 2:2, 2:3, 4:4, 40:1, 41:1	347(e).....	1:2
47(a) .....	1:1, 1:2, 1:3, 1:19, 41:1	347(g) & (h) .....	1:2
47(a)(1).....	40:1	347(i).....	1:20
47(a)(2)(IV). 1:1, 2:1, 2:2, 2:3, 2:5, 2:6, 40:1, 41:1		347(k) .....	1:15
47(a)(2)(IV) and (V). 2:1, 2:2, 2:3, 41:4		347(l) .....	4:2
47(a)(5).....	1:4, 1:7, 1:10	347(m) and (t) .....	1:8, 1:9
47(e).....	1:2	347(p) .....	4:14
47(g)& (h) .....	1:2	347(q) .....	4:2, 4:4
47(i) .....	1:20	347(r) & (s).....	4:2
47(k) .....	1:15	347(s).....	4:2
47(l) .....	4:2	347(u) .....	1:17, 1:19
47(m) and (t).....	1:8, 1:9	380(b) .....	3:11

COLORADO RULES OF CRIMINAL PROCEDURE

Rule	This work Instr. No.	Rule	This work Instr. No.
4 .....	21:15	9 .....	21:15
4(b)(1).....	21:17	9(b)(1).....	21:17
4(c).....	21:19	9(c).....	21:19
4(c)(1)(III).....	21:15	16(IV)(f) .....	1:9
4.1 .....	21:15	24.....	1:2, 40:1
4.2 .....	21:15	24(b).....	1:2
5(a) .....	21:19		

COLORADO RULES OF EVIDENCE

Rule	This work Instr. No.	Rule	This work Instr. No.
105 .....	1:11	603 .....	1:21
201(d) .....	3:8	604 .....	1:22
201(g).....	3:8	606(b).....	4:4, 36:11
301 .....	3:5, 3:6, 34:5, 34:9, 34:16	702 .....	3:15
408 .....	25:5	804(b)(1).....	3:11

COLORADO RULES OF JUVENILE PROCEDURE

Rule	This work Instr. No.	Rule	This work Instr. No.
1.....	40:1, 41:1	4(a).....	41:1
3.1(a).....	40:1	347(a).....	1:2, 1:3
3.5(b) .....	1:2, 40:1		

UNIFORM PROBATE CODE

Sec.	This work Instr. No.
2-502(b) .....	34:6

RESTATEMENT THIRD, AGENCY

Sec.	This work Instr. No.	Sec.	This work Instr. No.
1.01.....	8:1	1.04(2)(b) .....	8:3
1.01, Comment c .....	8:5	1.04(2)(c) .....	8:2
1.02.....	8:1	1.04(4) .....	8:2, 8:3
1.04(2) .....	8:2, 8:3	2.01 .....	8:9A
1.04(2)(a) .....	8:2		

# RESTATEMENT THIRD, AGENCY—Continued

Sec.	This work Instr. No.	Sec.	This work Instr. No.
2.01, Comment b .....	8:11	3.09 .....	8:16
2.01, Comment c .....	8:17	3.10 .....	8:16
2.02(2), (3).....	8:10	3.11.....	8:16, 8:17
2.02, Comment g .....	8:10, 8:11	5.02 .....	8:15
2.02(1).....	8:10, 8:11	6.03.....	8:3
2.02(2).....	8:11	6.11(4) .....	8:2, 8:3
2.02(3).....	8:11	7.03(2), Comment d .....	8:6
2.03 .....	8:12	7.03(d), Comment d .....	8:7
3.06 .....	8:16	7.07(2) .....	8:8, 8:13
3.07 .....	8:16	7.07(3).....	8:5
3.08 .....	8:16	7.07(3)(a).....	8:4, 8:5

# RESTATEMENT THIRD, TORTS (LIABILITY FOR PHYSICAL AND EMOTIONAL HARM)

Sec.	This work Instr. No.
14 .....	9:14

# RESTATEMENT THIRD, UNFAIR COMPETITION

Sec.	This work Instr. No.
46 .....	28:4

# RESTATEMENT SECOND, AGENCY

Sec.	This work Instr. No.	Sec.	This work Instr. No.
2.....	8:5	117-19.....	8:16
2(3), Comment b .....	8:1, 8:5	127-133 .....	8:17
4.....	8:2	135-136 .....	8:17
4(3).....	8:3	217C.....	5:4
14N .....	8:5, 8:18	220(2) .....	8:5
35 .....	8:10	227 .....	8:6
36 .....	8:11	228(2) .....	8:13
105-07.....	8:16	401.....	26:5

TABLE OF LAWS AND RULES

RESTATEMENT SECOND, CONTRACTS

Sec.	This work Instr. No.	Sec.	This work Instr. No.
4 .....	30:2	225 .....	30:15
153-54 .....	30:1	250 .....	30:13
159-173 .....	30:18	261-66 .....	30:23
161d, Comment f .....	26:4	262 through 263 .....	30:23
174-76 .....	30:20	266(2) .....	30:23
175(2) .....	30:20	281 .....	30:28
177(1), Comment b .....	30:19	317(1) .....	30:17
177(3) .....	30:19	317(2) .....	30:17
202 .....	30:34	346(2) .....	30:41
202(3)(b) .....	30:34	350, Comment e .....	5:2
205, Comment e .....	30:16	351 .....	30:39
224 .....	30:15	384 .....	30:18

RESTATEMENT SECOND, PROPERTY

Sec.	This work Instr. No.
9.1, Comment j .....	34:1

RESTATEMENT SECOND, TORTS

Sec.	This work Instr. No.	Sec.	This work Instr. No.
8A .....	28:3	46, Comment j .....	23:4
15 .....	20:6	46(1) .....	23:1
16 .....	20:7	49-62 .....	20:11
16(2) .....	20:8	63 .....	20:12
19 .....	20:6	65 .....	20:12
20 .....	20:7	67 .....	21:9
20(2) .....	20:8	76 .....	20:14, 21:9
21(1) .....	20:1	77 .....	20:15, 20:16
24 .....	20:2	80 .....	21:9
27 .....	20:2	87 .....	21:9
31, Comment a .....	20:10	100-106 .....	20:17
32 .....	20:3	112 .....	21:12
35 .....	21:1	119, Comment j .....	21:13
36, Comment d .....	21:2	119, Comment q .....	21:14
37 .....	21:3	120A .....	21:8
41 .....	21:1	122 .....	21:15
43-44 .....	21:3	123 .....	21:17
45 .....	21:4	127 .....	21:19
46 .....	23:2, 23:3, 23:5	128 .....	21:10, 21:11
46, Comment e .....	23:2	128(2) .....	21:16
46, Comment g .....	23:5	130(a) .....	21:17

# RESTATEMENT SECOND, TORTS—Continued

Sec.	This work Instr. No.	Sec.	This work Instr. No.
158.....	18:2	455.....	9:20
158-159.....	18:1	457.....	15:1
167.....	18:1	457, Comment d.....	9:20
167, Comment c.....	18:3	464.....	9:6, 9:9
222A.....	32:1, 32:2	491, Comment j.....	11:18
261.....	8:12, 8:22	494.....	10:1
282-84.....	9:6	520, Comment l.....	9:7A
283.....	9:8	550.....	19:6
283A.....	9:9	551(2)(e).....	19:2
283A, Comment c.....	11:5	552.....	9:4
283B.....	11:6	552, Comment a.....	9:4
283C.....	11:6	552, Comment g.....	9:4
286.....	9:14	552(3).....	9:4
288A.....	9:15	552A.....	9:4, 9:5
288C.....	9:15	552B(1).....	9:4
289.....	9:13, 11:1	558-581.....	22:1
290, Comment o.....	9:16	559.....	22:8
294.....	9:32	563, Comment b.....	22:12
299A.....	15:26	564.....	22:9, 22:11, 28:4
299A, Comment d.....	15:3	566, Comment c.....	22:1
302, Comment a.....	9:10	568A.....	22:1
311.....	9:3, 9:4	575.....	22:14
324.....	9:10	577.....	22:7, 28:4
324A.....	9:10	577A.....	22:23
357.....	12:11	578.....	22:7
359.....	12:10	580A, Comment d & i.....	28:4
362.....	12:12	580B, Comment d.....	28:4
388.....	14:19	581.....	28:4
395.....	14:17	581A.....	22:16
399.....	14:19	583.....	22:22
402A.....	14:1, 14:3, 14:26, 14:29	583, Comment c.....	22:22
402A, Comment j.....	14:4	583, Comment c and d.....	22:22
402A, Comment k.....	14:26	583, Comment d.....	22:22
402A, Comment n.....	14:25	584.....	22:22
402B.....	14:22	585-592A.....	22:17
402B, Comment g.....	14:23	593.....	22:18
402B, Comment g and h.....	14:23	598A.....	22:18
402B, Comment j.....	14:24	599-605A.....	22:18
405.....	16:3	611.....	22:19
407-408.....	16:4	612.....	22:20
431, Comment a.....	9:18	614.....	22:2
431-33.....	9:18	614(2).....	22:8
432.....	9:18	616.....	22:25
439.....	9:19	621-23.....	22:15
440-53.....	9:20	621-623.....	22:25
442B.....	9:20	652A, Comment a.....	28:1
443.....	9:20	652B.....	28:2

RESTATEMENT SECOND, TORTS—Continued

Sec.	This work Instr. No.	Sec.	This work Instr. No.
652C .....	28:4	669 .....	17:5
652D, Comment a .....	28:6	670–71 .....	17:9
652D, Comment b .....	28:5, 28:8	682, Comment b .....	17:12
652D, Comment c .....	28:9	766 .....	24:2, 24:5
652E, Comment a .....	28:6	766, Comment f .....	24:1
652E, Comment e .....	28:12	766A .....	24:1
652F .....	28:11	767 .....	24:1, 24:3
652F, Comment b .....	28:13	768 .....	24:6
652G .....	28:11	770 .....	23:1
652H .....	28:14	774A(1) .....	24:7
666 .....	17:7	892D .....	15:9
667(2) .....	17:3	929 .....	36:5
668 .....	17:4		

RESTATEMENT SECOND, TRUSTS

Sec.	This work Instr. No.
2, Comment b .....	26:4, 34:18

RESTATEMENT, CONTRACTS

Sec.	This work Instr. No.
454 .....	30:23

RESTATEMENT, TORTS

Sec.	This work Instr. No.
766 .....	24:1



## Table of Cases

---

### A

- A-1 Auto Repair & Detail, Inc. v. Bilunas-Hardy, 93 P.3d 598 (Colo. App. 2004)—32:1
- Aaberg v. H. A. Harman Co., 144 Colo. 579, 358 P.2d 601 (1960)—30:18
- A.B.-B., People ex rel., 215 P.3d 1205 (Colo. App. 2009)—40:1
- Abdelsamed v. New York Life Ins. Co., 857 P.2d 421 (Colo. App. 1992)—25:2
- A.B. Hirschfeld Press, Inc. v. Weston Group, Inc., 824 P.2d 44 (Colo. App. 1991)—7:4
- Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972)—22:18
- Accident & Injury Medical Specialists, P.C. v. Mintz, 2012 CO 50, 279 P.3d 658 (Colo. 2012)—15:18, 26:1, 26:2
- Accutool Precision Machining, Inc. v. Denver Metal Finishing, 680 P.2d 861 (Colo. App. 1984)—5:6
- A.C., IV v. People, 16 P.3d 240 (Colo. 2001)—40:1
- Ackerman v. City and County of Denver, 2015 COA 96M, 373 P.3d 665 (Colo. App. 2015)—12:15
- Ackmann v. Merchants Mortg. & Trust Corp., 659 P.2d 697, 36 U.C.C. Rep. Serv. 213, 36 A.L.R.4th 205 (Colo. App. 1982)—30:18
- Ackmann v. Merchants Mortg. & Trust Corp., 645 P.2d 7 (Colo. 1982)—19:2, 19:5, 19:13
- Acoustic Marketing Research, Inc. v. Technics, LLC, 198 P.3d 96 (Colo. 2008)—5:6
- Active Release Techniques, LLC v. Xtomic, LLC, 2017 COA 14, 413 P.3d 210 (Colo. App. 2017)—17:10
- Adams v. Corrections Corp. of America, 187 P.3d 1190 (Colo. App. 2008)—20:1
- Adams v. Frontier Airlines Federal Credit Union, 691 P.2d 352 (Colo. App. 1984)—31:6, 31:7
- Adams v. Leidholt, 195 Colo. 450, 579 P.2d 618 (1978)—9:17
- Adams v. Paine, Webber, Jackson & Curtis, Inc., 686 P.2d 797 (Colo. App. 1983)—5:4, 19:16
- Adams v. Schiffer, 11 Colo. 15, 17 P. 21 (1888)—30:20
- Adams County School Dist. No. 50 v. Dickey, 791 P.2d 688, 60 Ed. Law Rep. 964 (Colo. 1990)—31:4, 31:5
- Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)—35:1, 35:2
- Adkins v. Denver Dry Goods Co., 167 Colo. 545, 448 P.2d 957 (1969)—12:6
- ADT Security Services, Inc. v. Premier Home Protection, Inc., 181 P.3d 288, 64 U.C.C. Rep. Serv. 2d 178 (Colo. App. 2007)—30:16

- A.E.L., *People ex rel.*, 181 P.3d 1186 (Colo. App. 2008)—41:1
- Aetna Cas. & Sur. Co. v. Chisman, 528 P.2d 1317 (Colo. App. 1974)—32:2
- Aetna Cas. and Sur. Co. v. Crissy Fowler Lumber Co., 687 P.2d 514, 38 U.C.C. Rep. Serv. 749 (Colo. App. 1984)—9:14, 14:1, 14:13, 14:14
- Aetna Health Inc. v. Davila, 542 U.S. 200, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004)—25:2
- Agland, Inc. v. Koch Truck Line, Inc., 757 P.2d 1138 (Colo. App. 1988)—7:4
- A Good Time Rental, LLC v. First American Title Agency, Inc., 259 P.3d 534 (Colo. App. 2011)—26:2, 26:5
- Agritrack, Inc. v. DeJohn Housemoving, Inc., 25 P.3d 1187 (Colo. 2001)—30:8
- A.H., *People ex rel.*, 271 P.3d 1116 (Colo. App. 2011)—41:1
- Aiken v. Peters, 899 P.2d 382 (Colo. App. 1995)—10:3
- Aikens v. George W. Clayton Trust Com'n, 132 Colo. 374, 288 P.2d 349 (1955)—9:21
- Airborne, Inc. v. Denver Air Center, Inc., 832 P.2d 1086 (Colo. App. 1992)—6:11, 6:12, 6:13
- Air Wisconsin Airlines Corp. v. Hoeper, 2012 CO 19, 320 P.3d 830 (Colo. 2012)—22:3
- Ajay Sports, Inc. v. Casazza, 1 P.3d 267 (Colo. App. 2000)—5:4
- Alamosa, City of v. Johnson, 99 Colo. 134, 60 P.2d 1087 (1936)—12:16
- Albo v. Shamrock Oil & Gas Corp., 160 Colo. 144, 415 P.2d 536 (1966)—9:20
- Alcon v. Spicer, 113 P.3d 735 (Colo. 2005)—5:5
- Aldrich v. District Court of Eighteenth Judicial Dist. In and For Arapahoe County, 714 P.2d 1321 (Colo. 1986)—36:11
- Alexander v. Anstine, 152 P.3d 497 (Colo. 2007)—15:18, 26:2
- Alexander Co. v. Packard, 754 P.2d 780 (Colo. App. 1988)—26:2, 34:18
- Alhilo v. Kliem, 2016 COA 142, 412 P.3d 902 (Colo. App. 2016)—5:4, 6:1, 9:12
- Allabashi v. Lincoln Nat. Sales Corp. of Colorado-Wyoming, 824 P.2d 1 (Colo. App. 1991)—31:4
- Allen v. City of Aurora, 892 P.2d 333 (Colo. App. 1994)—17:1
- Allen v. Martin, 203 P.3d 546 (Colo. App. 2008)—15:18, 15:19, 15:20, 26:1
- Allen v. People, 660 P.2d 896 (Colo. 1983)—4:3
- Allen v. Ramada Inn, Inc., 778 P.2d 291 (Colo. App. 1989)—3:7, 9:1
- Allen v. Steele, 252 P.3d 476 (Colo. 2011)—9:4, 15:18, 15:21
- Aller v. Law Office of Carole C. Schriefer, P.C., 140 P.3d 23 (Colo. App. 2005)—15:18, 15:19, 15:21
- Alley v. Troutdale Hotel & Realty Co., 131 Colo. 124, 279 P.2d 1060 (1955)—3:4
- Allison v. Heller, 132 Colo. 415, 289 P.2d 160 (1955)—6:12
- Allstate Ins. Co. v. Huizar, 52 P.3d 816 (Colo. 2002)—30:31, 30:32, 30:33
- Allstate Ins. Co. v. Parfrey, 830 P.2d 905 (Colo. 1992)—9:14
- Allstate Ins. Co. v. Starke, 797 P.2d 14 (Colo. 1990)—25:9
- Allstate Insurance Company v. Medical Lien Management, Inc., 2015 CO 32, 348 P.3d 943 (Colo. 2015)—30:17

## TABLE OF CASES

- Alma, Town of v. AZCO Const., Inc., 10 P.3d 1256 (Colo. 2000)—14:1
- Alma, Town of v. Azco Const., Inc., 985 P.2d 56 (Colo. App. 1999)—30:55
- Aloi v. Union Pacific Railroad Corp., 129 P.3d 999 (Colo. 2006)—3:13
- Alvarez v. People, 653 P.2d 1127, 35 A.L.R.4th 613 (Colo. 1982)—1:5, 4:1
- Alzado v. Blinder, Robinson & Co., Inc., 752 P.2d 544, 79 A.L.R.4th 401 (Colo. 1988)—19:1
- Amber Properties, Ltd. v. Howard Elec. and Mechanical Co., Inc., 775 P.2d 43 (Colo. App. 1988)—5:4, 32:1
- American Family Mut. Ins. Co. v. Bowser, 779 P.2d 1376 (Colo. App. 1989)—25:2
- American Family Mut. Ins. Co. v. Johnson, 816 P.2d 952 (Colo. 1991)—30:35
- American Family Mutual Ins. Co. v. Allen, 102 P.3d 333 (Colo. 2004)—25:2, 25:3, 25:6
- American Family Mutual Insurance Company v. AN/CF Acquisition Corporation, 2015 COA 129, 361 P.3d 1098 (Colo. App. 2015)—7:5
- American Family Mutual Insurance Company v. Ashour, 2017 COA 67, 410 P.3d 753 (Colo. App. 2017)—25:2
- American Family Mutual Insurance Company v. Barriga, 2018 CO 42, 418 P.3d 1181 (Colo. 2018)—25:10
- American Family Mutual Insurance Company v. Hansen, 2016 CO 46, 375 P.3d 115 (Colo. 2016)—25:5
- American Furniture Co. of Denver v. Veazie, 131 Colo. 340, 281 P.2d 803 (1955)—6:14
- American Guarantee and Liability Ins. Company v. King, 97 P.3d 161 (Colo. App. 2003)—17:10, 17:12, 25:2
- American Nat. Bank v. Hammond, 25 Colo. 367, 55 P. 1090 (1898)—19:10, 19:15, 19:17
- American Safety Equipment Corp. v. Winkler, 640 P.2d 216 (Colo. 1982)—14:22, 14:23, 14:24
- American West Motel Brokers, Inc. v. Wu, 697 P.2d 34 (Colo. 1985)—30:56
- Amich and Adiutori, In re Marriage of, 192 P.3d 422 (Colo. App. 2007)—16:1, 16:5, 16:6
- Amoco Oil Co. v. Ervin, 908 P.2d 493, 28 U.C.C. Rep. Serv. 2d 452 (Colo. 1995)—24:1, 24:3, 30:16
- Andersen v. Whitley, 194 Colo. 87, 570 P.2d 525 (1977)—20:10
- Anderson v. Heron Engineering Co., Inc., 198 Colo. 391, 604 P.2d 674 (1979)—14:4, 14:9
- Anderson v. M.W. Kellogg Co., 766 P.2d 637 (Colo. 1988)—14:4
- Anderson v. Rosebrook, 737 P.2d 417, 3 U.C.C. Rep. Serv. 2d 1312 (Colo. 1987)—30:28
- Anderson v. Vail Corp., 251 P.3d 1125 (Colo. App. 2010)—9:1
- Anderson v. Watson, 953 P.2d 1284, 62 A.L.R.5th 877 (Colo. 1998)—5:3
- Andrade v. Johnson, 2016 COA 147, 409 P.3d 582 (Colo. App. 2016)—12:1, 12:2, 12:3
- Andres Trucking Company v. United Fire and Casualty Company, 2018 COA 144, 2018 WL 4496407 (Colo. App. 2018)—25:2

- Andrews v. Picard, 199 P.3d 6 (Colo. App. 2007)—6:14
- Ankeny v. Talbot, 126 Colo. 313, 250 P.2d 1019 (1952)—9:14, 11:9, 11:10
- Anson v. Trujillo, 56 P.3d 114 (Colo. App. 2002)—19:2, 19:17, 29:1
- Anstine v. Alexander, 128 P.3d 249 (Colo. App. 2005)—15:18, 15:21
- Antolovich v. Brown Group Retail, Inc., 183 P.3d 582 (Colo. App. 2007)—17:7, 17:8, 18:1, 18:2
- A.O. Smith Harvestore Products, Inc. v. Kallsen, 817 P.2d 1038, 15 U.C.C. Rep. Serv. 2d 744 (Colo. 1991)—9:4
- Apodaca v. Allstate Ins. Co., 232 P.3d 253 (Colo. App. 2009)—9:1
- Appel v. Sentry Life Ins. Co., 701 P.2d 634 (Colo. App. 1985)—5:4
- Appelgren v. Agri Chem, Inc., 39 Colo. App. 158, 562 P.2d 766 (App. 1977)—9:26
- Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961)—11:15
- Aquilini v. Chamblin, 94 Colo. 367, 30 P.2d 325 (1934)—34:7, 34:15
- Archer v. Farmer Bros. Co., 70 P.3d 495 (Colo. App. 2002)—5:4, 23:1, 23:2
- Arizona v. Johnson, 555 U.S. 323, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009)—21:11
- Arkansas Valley Bank v. Esser, 75 Colo. 110, 224 P. 227 (1924)—30:8
- Arline v. American Family Mutual Insurance Company, 2018 COA 82, 431 P.3d 670 (Colo. App. 2018)—25:9
- Armed Forces Bank, N.A. v. Hicks, 2014 COA 74, 365 P.3d 378 (Colo. App. 2014)—30:25
- Armentrout v. FMC Corp., 842 P.2d 175 (Colo. 1992)—12:3, 14:1, 14:3, 14:4, 14:27, 30:34
- Armentrout v. FMC Corp., 819 P.2d 522 (Colo. App. 1991)—14:27, 14:30, 14:30A
- Arnold v. Abernethy, 134 Colo. 573, 307 P.2d 1106 (1957)—34:16, 34:18
- Arnold v. Lawrence, 72 Colo. 528, 213 P. 129 (1923)—8:5
- Arnold By and Through Valle v. Colorado State Hosp., Dept. of Institutions, 910 P.2d 104 (Colo. App. 1995)—8:22
- Arrington v. Palmer, 971 P.2d 669 (Colo. App. 1998)—22:8
- Artist v. Butterweck, 162 Colo. 365, 426 P.2d 559 (1967)—15:3
- Arvada, City of v. Colorado Intergovernmental Risk Sharing Agency, 19 P.3d 10 (Colo. 2001)—25:1
- Arvada ex rel. Arvada Police Department, City of v. Denver Health and Hospital Authority, 2017 CO 97, 403 P.3d 609 (Colo. 2017)—30:10
- Aspen, City of v. Meserole, 803 P.2d 950 (Colo. 1990)—12:15
- Asplin v. Mueller, 687 P.2d 1329 (Colo. App. 1984)—3:5A
- Associates of San Lazaro v. San Lazaro Park Properties, 864 P.2d 111 (Colo. 1993)—30:25
- A.T. v. State Farm Mut. Auto. Ins. Co., 989 P.2d 219 (Colo. App. 1999)—28:5, 28:8, 28:13
- Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Authority, 183 Colo. 441, 517 P.2d 845 (1974)—36:10
- Aurora, City of v. Powell, 153 Colo. 4, 383 P.2d 798 (1963)—36:1
- Aurora, City of v. Weeks, 152 Colo. 509, 384 P.2d 90 (1963)—9:12
- Aurora, City of v. Woolman, 165 Colo. 377, 439 P.2d 364 (1968)—12:17
- Aurora ex rel. Utility Enterprise, City of v. Colorado State Engineer, 105 P.3d 595 (Colo. 2005)—8:1, 8:18

## TABLE OF CASES

- Austin v. Van Loon, 36 Colo. 196, 85 P. 183 (1906)—32:1  
 Auxier v. Auxier, 843 P.2d 93 (Colo. App. 1992)—9:1, 9:17  
 Avemco Ins. Co. v. Northern Colorado Air Charter, Inc., 38 P.3d 555  
 (Colo. 2002)—30:27  
 Avicanna Inc. v. Mewhinney, 2019 COA 129, 2019 WL 3949256 (Colo.  
 App. 2019)—30:25  
 Awai v. Kotin, 872 P.2d 1332 (Colo. App. 1993)—15:25  
 Axtell v. Park School Dist. R-3, 962 P.2d 319, 128 Ed. Law Rep. 1269  
 (Colo. App. 1998)—31:4

## B

- Backus v. Apishapa Land and Cattle Co., 44 Colo. App. 59, 615 P.2d 42  
 (App. 1980)—30:56  
 Bailey v. Huggins Diagnostic & Rehabilitation Center, Inc., 952 P.2d 768  
 (Colo. App. 1997)—9:1, 9:3  
 Bailey v. Montgomery Ward & Co., Inc., 690 P.2d 1280, 40 U.C.C. Rep.  
 Serv. 90 (Colo. App. 1984)—14:4, 14:10  
 Bailey v. Montgomery Ward & Co., Inc., 635 P.2d 899 (Colo. App.  
 1981)—14:17, 14:19  
 Bain v. Pioneer Plaza Shopping Center Ltd. Liability Co., 894 P.2d 47  
 (Colo. App. 1995)—30:9  
 Bainbrich v. Wells, 28 Colo. App. 432, 476 P.2d 53 (App. 1970)—7:4, 7:5  
 Bainbridge, Inc. v. Travelers Cas. Co. of Connecticut, 159 P.3d 748 (Colo.  
 App. 2006)—25:1, 25:9  
 Bair v. Public Service Employees Credit Union, 709 P.2d 961 (Colo. App.  
 1985)—19:2, 19:5  
 Bakehouse & Associates, Inc. v. Wilkins, 689 P.2d 1166 (Colo. App.  
 1984)—30:28  
 Baker v. Bratrsovsky, 689 P.2d 722 (Colo. App. 1984)—16:2  
 Baker v. Carpenter, 33 Colo. App. 139, 516 P.2d 459 (App. 1973)—24:1  
 Baker v. Wood, Ris & Hames, Professional Corporation, 2016 CO 5, 364  
 P.3d 872 (Colo. 2016)—9:4, 15:18, 19:2, 26:1, 26:2, 30:9  
 Baldwin v. Huber, 223 P.3d 150 (Colo. App. 2009)—21:13  
 Baldwin v. Peters, Writer & Christensen, 141 Colo. 529, 349 P.2d 146  
 (1960)—30:5, 30:6  
 Balkind v. Telluride Mountain Title Co., 8 P.3d 581 (Colo. App. 2000)—  
 9:4, 9:5, 19:1, 19:8, 19:9, 19:10  
 Ballow v. PHICO Ins. Co., 878 P.2d 672 (Colo. 1994)—5:2, 5:4, 9:4,  
 19:17, 25:9, 25:11  
 Ballow v. PHICO Ins. Co., 875 P.2d 1354 (Colo. 1993)—19:1, 19:2, 19:12,  
 19:15, 25:1, 25:6, 25:8  
 BA Mortg., LLC v. Quail Creek Condominium Ass'n, Inc., 192 P.3d 447  
 (Colo. App. 2008)—24:1  
 B & K Distributing, Inc. v. Drake Bldg. Corp., 654 P.2d 324 (Colo. App.  
 1982)—17:1, 17:8  
 Bankruptcy Estate of Morris v. COPIC Ins. Co., 192 P.3d 519 (Colo. App.  
 2008)—25:1, 25:3, 25:8, 25:9, 29:4  
 Banning v. Prester, 2012 COA 215, 317 P.3d 1284 (Colo. App. 2012)—  
 5:2

- Banyai v. Arruda, 799 P.2d 441 (Colo. App. 1990)—9:1
- Barfield v. Hall Realty, Inc., 232 P.3d 286 (Colo. App. 2010)—9:1, 19:1, 19:2, 19:5, 19:10, 26:2
- Barger v. Jimerson, 130 Colo. 459, 276 P.2d 744 (1954)—13:1
- Barham v. University of Northern Colorado, 964 P.2d 545, 129 Ed. Law Rep. 845 (Colo. App. 1997)—31:6
- Barker v. Jeremiasen, 676 P.2d 1259 (Colo. App. 1984)—30:25
- Barlow v. North Sterling Irr. Dist., 85 Colo. 488, 277 P. 469 (1929)—9:20
- Barnes v. Lehman, 118 Colo. 161, 193 P.2d 273 (1948)—5:4
- Barnett v. Denver Pub. Co., Inc., 36 P.3d 145 (Colo. App. 2001)—22:13, 22:16
- Barnhart v. American Furniture Warehouse Company, 2013 COA 158, 338 P.3d 1027 (Colo. App. 2013)—10:3
- Barrack v. City of Lafayette, 829 P.2d 424 (Colo. App. 1991)—30:23
- Barron v. Kerr-McGee Rocky Mountain Corp., 181 P.3d 348 (Colo. App. 2007)—9:1, 12:1, 12:2, 12:3
- Barrows v. McMurtry Mfg. Co., 54 Colo. 432, 131 P. 430 (1913)—30:20
- Barry v. Bally Gaming, Inc., 2013 COA 176, 320 P.3d 387 (Colo. App. 2013)—23:1
- Barsch v. Hammond, 110 Colo. 441, 135 P.2d 519 (1943)—9:14
- Bartch v. U.S., 330 F.2d 466 (10th Cir. 1964)—10:3
- Barter Machinery & Supply Co. v. Muchow, 169 Colo. 100, 453 P.2d 804 (1969)—6:1
- Bartlett v. Bryant, 166 Colo. 113, 442 P.2d 425 (1968)—11:13
- Bartley v. Floyd, 695 P.2d 781 (Colo. App. 1984)—9:14, 9:21
- Barton v. Adams Rental, Inc., 938 P.2d 532 (Colo. 1997)—4:20, 9:28, 14:1, 14:3, 14:4, 14:6, 14:30, 14:30A
- Barton v. Sittner, 723 P.2d 153 (Colo. App. 1986)—30:56
- Bashor v. Northland Ins. Co., 29 Colo. App. 81, 480 P.2d 864 (App. 1970)—25:1
- Basnett v. Vista Village Mobile Home Park, 699 P.2d 1343 (Colo. App. 1984)—19:2
- Bassett v. Eagle Telecommunications Inc. of Colorado, 708 P.2d 812 (Colo. App. 1985)—30:35
- Bassford v. Cook, 152 Colo. 136, 380 P.2d 907 (1963)—19:10, 30:18
- Bates v. Stagg, 157 Colo. 456, 404 P.2d 530 (1965)—2:5
- Bath Excavating & Const. Co. v. Wills, 847 P.2d 1141 (Colo. 1993)—9:1
- Batterman v. Wells Fargo Ag Credit Corp., 802 P.2d 1112 (Colo. App. 1990)—7:4, 24:7
- Bauer v. Southwest Denver Mental Health Center, Inc., 701 P.2d 114 (Colo. App. 1985)—8:22, 9:14, 23:1, 23:2
- Baumgarten v. Coppage, 15 P.3d 304 (Colo. App. 2000)—15:21, 15:26
- Bayer v. Crested Butte Mountain Resort, Inc., 960 P.2d 70 (Colo. 1998)—9:7, 9:14
- Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc., 739 P.2d 239 (Colo. 1987)—9:1, 9:18
- Bayou Land Co. v. Talley, 924 P.2d 136 (Colo. 1996)—30:16
- Beadles v. Metayka, 135 Colo. 366, 311 P.2d 711 (1957)—15:1

## TABLE OF CASES

- Beal Corp. Liquidating Trust v. Valleylab, Inc., 927 F. Supp. 1350 (D. Colo. 1996)—30:16
- Beaman v. Stewart, 34 Colo. 356, 83 P. 629 (1905)—32:1
- Beasley v. Best Car Buys, LTD, 2015 COA 145, 363 P.3d 777 (Colo. App. 2015)—9:1, 9:14
- Beaumont v. Brown, 401 Mich. 80, 257 N.W.2d 522 (1977)—28:5
- Bebo Const. Co. v. Mattox & O'Brien, P.C., 998 P.2d 475 (Colo. App. 2000)—7:6
- Bebo Const. Co. v. Mattox & O'Brien, P.C., 990 P.2d 78 (Colo. 1999)—15:18, 15:19, 15:21
- Becker & Tenenbaum v. Eagle Restaurant Co., Inc., 946 P.2d 600 (Colo. App. 1997)—5:4, 32:4, 32:6
- Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 88 S. Ct. 197, 19 L. Ed. 2d 248 (1967)—22:3
- Bedard v. Martin, 100 P.3d 584 (Colo. App. 2004)—9:4, 9:5
- Bedee v. American Medical Response of Colorado, 2015 COA 128, 361 P.3d 1083 (Colo. App. 2015)—9:1, 9:6, 9:7, 9:8
- Bedor v. Johnson, 2013 CO 4, 292 P.3d 924 (Colo. 2013)—9:11
- Beeson v. Kelran Constructors, Inc., 43 Colo. App. 505, 608 P.2d 369 (App. 1979)—8:8, 8:22
- Begley v. Ireson, 2017 COA 3, 399 P.3d 777 (Colo. App. 2017)—15:18
- Behr v. McCoy, 138 Colo. 137, 330 P.2d 535 (1958)—9:13
- Belfiore v. Colorado State Dept. of Highways, 847 P.2d 244 (Colo. App. 1993)—12:15
- Belfor USA Group, Inc. v. Rocky Mountain Caulking and Waterproofing, LLC, 159 P.3d 672 (Colo. App. 2006)—30:39
- Belle Bonfils Memorial Blood Bank v. Hansen, 665 P.2d 118, 36 U.C.C. Rep. Serv. 787 (Colo. 1983)—14:26
- Bell Lumber Co. v. Graham, 74 Colo. 149, 219 P. 777 (1923)—17:1
- Bell Press, Inc. v. Phillips, 147 Colo. 461, 364 P.2d 398 (1961)—19:13
- Belt v. Spencer, 41 Colo. App. 227, 585 P.2d 922 (App. 1978)—30:55
- Bement v. Empire Elec. Ass'n, Inc., 728 P.2d 706 (Colo. 1986)—36:4
- Benallo v. Bare, 162 Colo. 22, 427 P.2d 323 (1967)—9:9
- Beneficial Finance Co. of Arvada v. Sullivan, 534 P.2d 1226 (Colo. App. 1975)—32:2
- Beneficial Finance Co. of Colorado v. Bach, 665 P.2d 1034 (Colo. App. 1983)—8:2
- Bengtson v. USAA Property & Cas. Ins., 3 P.3d 1233 (Colo. App. 2000)—30:31
- Benham v. Heyde, 122 Colo. 233, 221 P.2d 1078 (1950)—30:56
- Bennett v. Greeley Gas Co., 969 P.2d 754 (Colo. App. 1998)—5:4, 8:18, 9:6, 9:7, 9:7A, 9:22
- Bennett v. Hall, 132 Colo. 419, 290 P.2d 241 (1955)—11:2, 11:8
- Bennett v. Price, 692 P.2d 1138 (Colo. App. 1984)—30:42
- Bereman v. Power Pub. Co., 93 Colo. 581, 27 P.2d 749, 92 A.L.R. 1024 (1933)—22:18
- Beren, In re Estate of, 2012 COA 203M, 412 P.3d 487 (Colo. App. 2012)—6:10
- Berger v. Security Pacific Information Systems, Inc., 795 P.2d 1380 (Colo. App. 1990)—5:2, 5:4, 19:2, 19:5

- Bermel v. BlueRadios, Inc., 2019 CO 31, 440 P.3d 1150 (Colo. 2019)—32:4, 32:5
- Bernardi v. Community Hospital Ass'n, 166 Colo. 280, 443 P.2d 708 (1968)—8:6, 8:7, 8:22, 15:1
- Bernhard v. Farmers Ins. Exchange, 915 P.2d 1285 (Colo. 1996)—5:7, 25:8, 25:9
- Bernhard v. Farmers Ins. Exchange, 885 P.2d 265 (Colo. App. 1994)—25:3, 25:9
- Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962)—22:1, 22:2, 22:14
- Bernstein v. Simon, 77 Colo. 193, 235 P. 375 (1925)—17:9
- Berrey v. White Wing Services, Inc., 44 Colo. App. 506, 619 P.2d 82 (App. 1980)—9:17
- Berry v. Bass, 157 La. 81, 102 So. 76 (1924)—21:12
- Bert Bidwell Inv. Corp. v. LaSalle and Schiffer, P.C., 797 P.2d 811 (Colo. App. 1990)—5:2
- Bertrand v. Board of County Com'rs of Park County, 872 P.2d 223 (Colo. 1994)—12:15
- Betoney v. Union Pacific R. Co., 701 P.2d 62 (Colo. App. 1984)—12:17
- Betterview Investments, LLC v. Public Service Co. of Colorado, 198 P.3d 1258 (Colo. App. 2008)—18:1
- Bettner v. Boring, 764 P.2d 829 (Colo. 1988)—11:12
- Bewley v. Semler, 2018 CO 79, 432 P.3d 582 (Colo. 2018)—15:18, 30:9
- B.G.'s, Inc. v. Gross ex rel. Gross, 23 P.3d 691 (Colo. 2001)—4:20, 9:28, 10:3
- Bidwell v. Jolly, 716 P.2d 481 (Colo. App. 1986)—8:2
- Biel v. Alcott, 876 P.2d 60 (Colo. App. 1993)—9:1
- Bigby v. Big 3 Supply Co., 937 P.2d 794, 17 A.D.D. 212 (Colo. App. 1996)—9:2, 23:1
- Big Five Mining Co. v. Left Hand Ditch Co., 73 Colo. 545, 216 P. 719 (1923)—18:4
- Biggerstaff v. Zimmerman, 108 Colo. 194, 114 P.2d 1098 (1941)—22:1
- Bilawsky v. Faseehudin, 916 P.2d 586 (Colo. App. 1995)—15:1
- Billings v. Boercker, 648 P.2d 172 (Colo. App. 1982)—5:2
- Bilsten v. Porter, 33 Colo. App. 208, 516 P.2d 656 (App. 1973)—7:5
- Bilz v. Powell, 50 Colo. 482, 117 P. 344 (1911)—30:40
- Biosera, Inc. v. Forma Scientific, Inc., 941 P.2d 284 (Colo. App. 1996)—14:3
- Bird v. Richardson, 140 Colo. 310, 344 P.2d 957 (1959)—11:11
- Bithell v. Western Care Corp., 762 P.2d 708 (Colo. App. 1988)—24:1, 24:5, 24:6, 26:1
- Bittersweet Farms, Inc. v. Zimbelman, 976 P.2d 326 (Colo. App. 1998)—18:1
- Bittle v. Brunetti, 750 P.2d 49 (Colo. 1988)—9:1
- Bittle v. Brunetti, 712 P.2d 1112 (Colo. App. 1985)—9:14
- Black v. Black, 2018 COA 7, 422 P.3d 592 (Colo. App. 2018)—32:4
- Black v. First Federal Sav. and Loan Ass'n of Fargo, North Dakota, F.A., 830 P.2d 1103 (Colo. App. 1992)—7:3, 19:1, 19:2, 19:17
- Blackman v. Edsall, 17 Colo. App. 429, 68 P. 790 (1902)—34:15

## TABLE OF CASES

- Blackman for Blackman v. Rifkin, 759 P.2d 54 (Colo. App. 1988)—9:6,  
15:6, 15:9, 21:1, 21:6
- Blackwell v. Del Bosco, 35 Colo. App. 399, 536 P.2d 838 (App. 1975)—  
23:2
- Blades v. DaFoe, 666 P.2d 1126 (Colo. App. 1983)—15:7, 15:10, 15:13
- Blakesley v. BNSF Railway Company, 2019 COA 119, 459 P.3d 715  
(Colo. App. 2019)—9:1
- Blankette v. Public Service Co. of Colorado, 90 Colo. 456, 10 P.2d 327  
(1932)—9:7, 9:8
- Bledsoe Land Co. LLLP v. Forest Oil Corp., 277 P.3d 838 (Colo. App.  
2011)—30:34
- Blinder, Robinson & Co., Inc. v. Alzado, 713 P.2d 1314 (Colo. App.  
1985)—19:1
- Blood v. Qwest Services Corp., 224 P.3d 301 (Colo. App. 2009)—5:4,  
30:10, 30:12, 30:15
- Bloomer v. Board of County Com'rs of Boulder County, 799 P.2d 942  
(Colo. 1990)—12:15
- Bloskas v. Murray, 646 P.2d 907, 42 A.L.R.4th 527 (Colo. 1982)—9:3,  
9:4, 15:7, 15:11, 15:12, 20:1
- Blount v. Romero, 157 Colo. 130, 401 P.2d 611 (1965)—2:5
- Bloxsom v. San Luis Valley Crop Care, Inc., 198 Colo. 113, 596 P.2d  
1189 (1979)—9:17
- Blueflame Gas, Inc. v. Van Hoose, 679 P.2d 579 (Colo. 1984)—9:7, 14:1
- Bly v. Story, 241 P.3d 529 (Colo. 2010)—36:7, 36:9, 36:10
- BMS Partnership v. Winter Park Devil's Thumb Inv. Co., 910 P.2d 61  
(Colo. App. 1995)—8:15
- BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134  
L. Ed. 2d 809 (1996)—5:4
- Board of Com'rs of Jefferson County v. Noble, 117 Colo. 77, 184 P.2d 142  
(1947)—36:2, 36:4, 36:6
- Board of County Commissioners of County of Weld v. DPG Farms, LLC,  
2017 COA 83, 2017 WL 2589519 (Colo. App. 2017)—36:5, 36:6, 36:7,  
36:10
- Board of County Com'rs of Adams County v. City and County of Denver,  
40 P.3d 25 (Colo. App. 2001)—30:40
- Board of County Com'rs of County of La Plata v. Moreland, 764 P.2d 812  
(Colo. 1988)—9:1
- Board of County Com'rs of Eagle County v. Vail Associates, Limited, 171  
Colo. 381, 468 P.2d 842 (1970)—36:6, 36:8
- Board of County Com'rs of Garfield County v. Delaney, 41 Colo. App.  
548, 592 P.2d 1338 (App. 1978)—36:2, 36:4, 36:10
- Board of County Com'rs of Garfield County v. Tenbrook, 491 P.2d 597  
(Colo. App. 1971)—36:8
- Board of County Com'rs of Gunnison County v. McClure Venture, 41  
Colo. App. 524, 594 P.2d 585 (App. 1978)—36:1
- Board of County Com'rs of Jefferson County v. Evergreen, Inc., 35 Colo.  
App. 171, 532 P.2d 777 (App. 1974)—36:8
- Board of County Com'rs of Summit County v. DeLozier, 917 P.2d 714  
(Colo. 1996)—30:7
- Board of County Com'rs of Weld County v. Highland Mobile Home Park,  
Inc., 543 P.2d 103 (Colo. App. 1975)—36:8

- Board of County Com'rs of Weld County v. Slovek, 723 P.2d 1309 (Colo. 1986)—6:12, 18:4
- Board of Educ. of West Yuma School Dist. RJ-1 v. Flaming, 938 P.2d 151, 118 Ed. Law Rep. 1202 (Colo. 1997)—31:6
- Boatright v. Derr, 919 P.2d 221 (Colo. 1996)—15:18
- Bob Blake Builders, Inc. v. Gramling, 18 P.3d 859 (Colo. App. 2001)—23:1, 23:2
- Bobrick v. Taylor, 171 Colo. 375, 467 P.2d 822 (1970)—18:4
- Bock v. Brody, 870 P.2d 530 (Colo. App. 1993)—26:2, 26:3, 34:18
- Bodeman v. Shutto Super Markets, Inc., 197 Colo. 393, 593 P.2d 700 (1979)—12:6
- Bodo v. Logan, 145 Colo. 474, 358 P.2d 889 (1961)—5:2
- Boettcher & Co., Inc. v. Munson, 854 P.2d 199 (Colo. 1993)—6:10
- Boettcher DTC Bldg. Joint Venture v. Falcon Ventures, 762 P.2d 788 (Colo. App. 1988)—8:16, 24:1, 24:6
- Boggs v. McMickle, 120 Colo. 53, 206 P.2d 824 (1949)—30:14
- Bohe v. Scott, 83 Colo. 374, 265 P. 694 (1928)—19:5
- Bohrer v. Church Mut. Ins. Co., 965 P.2d 1258 (Colo. 1998)—25:1
- Bohrer v. DeHart, 961 P.2d 472 (Colo. 1998)—9:29
- Bohrer v. DeHart, 943 P.2d 1220 (Colo. App. 1996)—20:1, 23:1, 23:2
- Boigegrain v. Gilbert, 784 P.2d 849 (Colo. App. 1989)—15:21
- Boles v. Sun Ergoline, Inc., 223 P.3d 724 (Colo. 2010)—14:1
- Bolz v. Security Mut. Life Ins. Co., 721 P.2d 1216 (Colo. App. 1986)—25:2
- Bond-Connell Sheep & Wool Co. v. Snyder, 68 Colo. 238, 188 P. 740 (1920)—7:3
- Bond v. E.I. DuPont De Nemours and Co., 868 P.2d 1114 (Colo. App. 1993)—14:1, 14:3, 14:19, 14:22
- Bonidy v. Vail Valley Center for Aesthetic Dentistry, P.C., 232 P.3d 277 (Colo. App. 2010)—5:4, 31:8, 31:12, 31:15
- Bonidy v. Vail Valley Center for Aesthetic Dentistry, P.C., 186 P.3d 80 (Colo. App. 2008)—31:12
- Bonnet v. Foote, 47 Colo. 282, 107 P. 252 (1910)—15:3, 15:4
- Bookout v. Victor Comptometer Corp., 40 Colo. App. 417, 576 P.2d 197 (App. 1978)—14:4
- Booth v. University of Colorado, 64 P.3d 926, 174 Ed. Law Rep. 759 (Colo. App. 2002)—12:15
- Borquez v. Robert C. Ozer, P.C., 923 P.2d 166 (Colo. App. 1995)—5:4, 28:13
- Boryla v. Pash, 960 P.2d 123 (Colo. 1998)—6:1, 15:1
- Bosick v. Youngblood, 95 Colo. 532, 37 P.2d 1095 (1934)—19:10
- Boulder, City of v. Fowler Irrevocable Trust 1992-1, 53 P.3d 725 (Colo. App. 2002)—36:3
- Boulder, City of v. Public Service Co. of Colorado, 996 P.2d 198 (Colo. App. 1999)—30:16
- Boulders at Escalante LLC v. Otten Johnson Robinson Neff and Ragonetti PC, 2015 COA 85, 412 P.3d 751 (Colo. App. 2015)—9:1, 15:18, 15:19, 15:27
- Boulder Valley School Dist. R-2 v. Price, 805 P.2d 1085, 65 Ed. Law Rep. 1252 (Colo. 1991)—31:9

## TABLE OF CASES

- Bowers v. Loveland Pub. Co., 773 P.2d 595 (Colo. App. 1988)—22:1, 22:3
- Bowser v. Union Bag Co., 112 Colo. 373, 149 P.2d 800 (1944)—8:12
- Boyd v. A.O. Smith Harvestore Products, Inc., 776 P.2d 1125, 9 U.C.C. Rep. Serv. 2d 571 (Colo. App. 1989)—14:16
- Boyd v. Close, 82 Colo. 150, 257 P. 1079 (1927)—7:5, 11:15
- Boyd v. Garvert, 9 P.3d 1161 (Colo. App. 2000)—15:18, 15:21, 15:25, 26:1
- Boyer v. Elkins, 154 Colo. 294, 390 P.2d 460 (1964)—21:10, 21:11
- Boyer v. Health Grades, Inc., 2015 CO 40, 359 P.3d 25 (Colo. 2015)—17:10
- Boyle v. Bay, 81 Colo. 125, 254 P. 156 (1927)—30:39
- BP America Production Co. v. Patterson, 263 P.3d 103 (Colo. 2011)—19:2
- BP America Production Co. v. Patterson, 185 P.3d 811 (Colo. 2008)—30:26
- Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 33 Colo. App. 99, 517 P.2d 406 (App. 1973)—14:1
- Bradley v. Guess, 797 P.2d 749 (Colo. App. 1989)—9:20
- Bradley Realty Inv. Co. v. Shwartz, 145 Colo. 65, 357 P.2d 638 (1960)—30:56
- Bradshaw v. Nicolay, 765 P.2d 630 (Colo. App. 1988)—23:1
- Brady v. Burlington Northern R. Co., 752 P.2d 592 (Colo. App. 1988)—6:1, 9:13, 15:16
- Brady v. Hoepfner, 38 Colo. App. 495, 558 P.2d 1009 (App. 1977)—30:56
- Brakhage v. Georgetown Associates, Inc., 33 Colo. App. 385, 523 P.2d 145 (App. 1974)—30:56
- Branco Eastern Co. v. Leffler, 173 Colo. 428, 482 P.2d 364 (1971)—9:17
- Brandon v. Sterling Colorado Beef Co., 827 P.2d 559 (Colo. App. 1991)—25:2
- Brannan v. Collins, 89 Colo. 492, 4 P.2d 684 (1931)—19:11
- Branscum v. American Community Mut. Ins. Co., 984 P.2d 675 (Colo. App. 1999)—9:4
- Breckenridge Co. v. Swales Management Corp., 185 Colo. 160, 522 P.2d 737 (1974)—7:4
- Breeden v. Dailey, 40 Colo. App. 70, 574 P.2d 508 (App. 1977)—26:2, 30:23
- Breeden v. Stone, 992 P.2d 1167 (Colo. 2000)—34:11, 34:12
- Brewer v. American and Foreign Ins. Co., 837 P.2d 236 (Colo. App. 1992)—25:11
- Brewer v. Williams, 147 Colo. 146, 362 P.2d 1033 (1961)—30:56
- Briggs v. American Nat. Property and Cas. Co., 209 P.3d 1181 (Colo. App. 2009)—19:4
- Briggs v. Cornwell, 676 P.2d 1252 (Colo. App. 1983)—6:1
- Bristol Bay Productions, LLC v. Lampack, 2013 CO 60, 312 P.3d 1155 (Colo. 2013)—19:1
- Bristol Co., LP v. Osman, 190 P.3d 752 (Colo. App. 2007)—15:19
- Brittis v. Freemon, 34 Colo. App. 348, 527 P.2d 1175 (App. 1974)—5:6, 6:1, 6:8
- Brncic v. Metz, 28 Colo. App. 204, 471 P.2d 618 (App. 1970)—6:1

- Brochner v. Western Ins. Co., 724 P.2d 1293 (Colo. 1986)—5:7
- Broderick v. City and County of Denver, 727 P.2d 881 (Colo. App. 1986)—12:15
- Broderick v. McElroy and McCoy, Inc., 961 P.2d 504 (Colo. App. 1997)—4:20, 9:28, 9:29
- Broderick Inv. Co. v. Strand Nordstrom Stailey Parker, Inc., 794 P.2d 264 (Colo. App. 1990)—9:1
- Brodeur v. American Home Assur. Co., 169 P.3d 139 (Colo. 2007)—19:14, 25:1, 25:2, 25:8, 26:2, 29:1, 29:2, 29:3, 29:4
- Brody v. Bock, 897 P.2d 769 (Colo. 1995)—19:12
- Broker House Intern., Ltd. v. Bendelow, 952 P.2d 860 (Colo. App. 1998)—15:18
- Brooks v. Paige, 773 P.2d 1098 (Colo. App. 1988)—23:1
- Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Company, 2017 COA 31, 413 P.3d 219 (Colo. App. 2017)—30:10
- Broughall v. Black Forest Development Co., 196 Colo. 503, 593 P.2d 314 (1978)—30:56
- Brown v. Barnes, 133 Colo. 411, 296 P.2d 739 (1956)—22:1, 22:2, 22:14
- Brown v. Hughes, 94 Colo. 295, 30 P.2d 259 (1934)—3:4, 15:2, 15:3, 15:4
- Brown v. Jefferson County School Dist. No. R-1, 2012 COA 98, 297 P.3d 976, 291 Ed. Law Rep. 454 (Colo. App. 2012)—30:13
- Brown v. Kreuser, 38 Colo. App. 554, 560 P.2d 105 (App. 1977)—6:9, 9:6, 9:31
- Brown v. Martin Marietta Corp., 690 P.2d 889 (Colo. App. 1984)—12:6
- Brown v. Silvern, 45 P.3d 749 (Colo. App. 2001)—15:18, 15:19
- Brown v. Spain, 171 Colo. 205, 466 P.2d 462 (1970)—9:30
- Bruce Hughes, Inc. v. Ingels & Associates, Inc., 653 P.2d 88 (Colo. App. 1982)—30:45
- Bruckman v. Pena, 29 Colo. App. 357, 487 P.2d 566 (App. 1971)—6:8
- Brunner v. Horton, 702 P.2d 283 (Colo. App. 1985)—26:1, 26:2
- Brush Hay & Mill. Co. v. Small, 154 Colo. 11, 388 P.2d 84 (1963)—8:5
- BSLNI, Inc. v. Russ T. Diamonds, Inc., 2012 COA 214, 293 P.3d 598 (Colo. App. 2012)—30:16
- Bucci v. Pizza, 90 Colo. 30, 6 P.2d 5 (1931)—19:10
- Bucholtz v. Safeco Ins. Co. of America, 773 P.2d 590 (Colo. App. 1988)—25:2
- Buckhannon v. US West Communications, Inc., 928 P.2d 1331 (Colo. App. 1996)—15:18, 24:6
- Buder v. Sartore, 774 P.2d 1383 (Colo. 1989)—26:5
- Build It and They Will Drink, Inc. v. Strauch, 253 P.3d 302 (Colo. 2011)—9:1, 9:21
- Bullerdick v. Pritchard, 90 Colo. 272, 8 P.2d 705 (1932)—18:4
- Bumbal v. Smith, 165 P.3d 844 (Colo. App. 2007)—29:5
- Burbach v. Canwest Inv., LLC, 224 P.3d 437 (Colo. App. 2009)—12:1, 12:2, 12:3
- Burch v. Burch, 145 Colo. 125, 358 P.2d 1011 (1960)—30:7
- Burck v. Hubbard, 104 Colo. 83, 88 P.2d 955 (1939)—8:12
- Burgess v. Mid-Century Ins. Co., 841 P.2d 325 (Colo. App. 1992)—25:2, 25:11

## TABLE OF CASES

- Burke v. Greene, 963 P.2d 1119 (Colo. App. 1998)—22:17, 22:18, 22:23  
Burman v. Richmond Homes Ltd., 821 P.2d 913 (Colo. App. 1991)—9:4, 19:2, 19:5, 19:13  
Burnett v. State Department of Natural Resources, 2015 CO 19, 346 P.3d 1005 (Colo. 2015)—12:15  
Burnford v. Blanning, 189 Colo. 292, 540 P.2d 337 (1975)—30:8  
Burns v. McGraw-Hill Broadcasting Co., Inc., 659 P.2d 1351 (Colo. 1983)—22:1, 22:3, 22:8, 22:11  
Burr v. Green Bros. Sheet Metal, Inc., 159 Colo. 25, 409 P.2d 511 (1966)—9:6  
Burrell v. Anderson, 133 Colo. 386, 295 P.2d 1039 (1956)—9:30  
Burron's Estate v. Edwards, 42 Colo. App. 141, 594 P.2d 1064 (App. 1979)—5:4  
Burt v. Beautiful Savior Lutheran Church of Broomfield, 809 P.2d 1064 (Colo. App. 1990)—5:2, 18:1, 18:2, 18:4  
Burt v. Rocky Mountain Fuel Co., 71 Colo. 205, 205 P. 741 (1922)—12:14  
Butcher v. Cordova, 728 P.2d 388 (Colo. App. 1986)—9:1  
Butler v. Lembeck, 182 P.3d 1185 (Colo. App. 2007)—30:40  
Buwana, In re, 338 B.R. 441, 207 Ed. Law Rep. 237 (Bankr. D. Colo. 2004)—30:29  
Byron v. York Inv. Co., 133 Colo. 418, 296 P.2d 742 (1956)—32:1, 32:2, 32:3

## C

- Cade v. Regensberger, 804 P.2d 238 (Colo. App. 1990)—22:23  
Cahill v. Readon, 85 Colo. 9, 273 P. 653 (1928)—19:2, 19:3, 19:5, 19:15  
Calderon v. American Family Mutual Insurance Company, 2016 CO 72, 383 P.3d 676 (Colo. 2016)—25:9  
Calderon v. American Family Mutual Insurance Company, 2014 COA 70, 409 P.3d 393 (Colo. App. 2014)—6:1  
Caldwell v. Armstrong, 642 P.2d 47 (Colo. App. 1981)—30:28  
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)—17:10  
Calkins v. Albi, 163 Colo. 370, 431 P.2d 17 (1967)—9:9, 9:14, 9:20  
Callaham v. Slavsky, 153 Colo. 291, 385 P.2d 674 (1963)—6:12  
Calvaresi v. National Development Co., Inc., 772 P.2d 640 (Colo. App. 1988)—9:1, 18:4  
Camacho v. Honda Motor Co., Ltd., 741 P.2d 1240 (Colo. 1987)—14:3, 14:4  
Camacho v. Mennonite Bd. of Missions, 703 P.2d 598 (Colo. App. 1985)—9:1  
CAMAS Colorado, Inc. v. Board of County Com'rs, 36 P.3d 135 (Colo. App. 2001)—30:10, 30:26  
Campbell v. Burt Toyota-Diahsatsu, Inc., 983 P.2d 95 (Colo. App. 1998)—9:1, 14:4  
Campbell v. Jenkins, 43 Colo. App. 458, 608 P.2d 363 (App. 1979)—20:2, 20:4  
Campbell v. Koin, 154 Colo. 425, 391 P.2d 365 (1964)—30:46, 30:49

- Campbell v. Summit Plaza Associates, 192 P.3d 465 (Colo. App. 2008)—9:4
- Canape v. Petersen, 897 P.2d 762 (Colo. 1995)—9:14
- Canape v. Peterson, 878 P.2d 83 (Colo. App. 1994)—9:17
- Cannon Coal Co. v. Taggart, 1 Colo. App. 60, 27 P. 238 (1891)—30:44
- Cantrell v. Forest City Pub. Co., 419 U.S. 245, 95 S. Ct. 465, 42 L. Ed. 2d 419 (1974)—22:27
- Card v. Blakeslee, 937 P.2d 846 (Colo. App. 1996)—9:2, 22:7, 23:1
- Carder, Inc. v. Cash, 97 P.3d 174 (Colo. App. 2003)—30:39, 32:1
- Cardwell Inv. Co. v. United Supply & Mfg. Co., 268 F.2d 857 (10th Cir. 1959)—30:29
- Carlberg v. Willmott, 87 Colo. 374, 287 P. 863 (1930)—13:1
- Carlock v. Denver & R. G. R. Co., 55 Colo. 146, 133 P. 1103 (1913)—9:19
- Carlsen v. Hay, 69 Colo. 485, 195 P. 103 (1921)—30:4
- Carl's Italian Restaurant v. Truck Ins. Exchange, 183 P.3d 636 (Colo. App. 2007)—8:12
- Carlson v. Bain, 116 Colo. 526, 182 P.2d 909 (1947)—30:39
- Carlson v. Ferris, 85 P.3d 504 (Colo. 2003)—5:3
- Carlson v. Ferris, 58 P.3d 1055 (Colo. App. 2002)—9:22
- Carlson v. Garrison, 689 P.2d 735 (Colo. App. 1984)—19:2
- Carlson v. McNeill, 114 Colo. 78, 162 P.2d 226 (1945)—18:4
- Carman v. Heber, 43 Colo. App. 5, 601 P.2d 646 (App. 1979)—9:22, 12:1, 12:16, 17:9, 17:11, 20:4, 21:5, 24:1, 24:5, 26:5
- Caro v. Bumpus, 30 Colo. App. 144, 491 P.2d 606 (App. 1971)—15:2
- Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964)—6:14, 19:2, 19:17, 30:54, 30:55
- Carpenter v. Francis, 136 Colo. 494, 319 P.2d 497 (1957)—30:56
- Carruthers v. Carrier Access Corp., 251 P.3d 1199 (Colo. App. 2010)—31:7
- Carter v. Brighton Ford, Inc., 251 P.3d 1179 (Colo. App. 2010)—14:1, 14:8
- Carter v. Lovelace, 844 P.2d 1288 (Colo. App. 1992)—9:6
- Cary v. United of Omaha Life Ins. Co., 108 P.3d 288 (Colo. 2005)—30:31
- Cary v. United of Omaha Life Ins. Co., 68 P.3d 462 (Colo. 2003)—25:2
- Casebolt v. Cowan, 829 P.2d 352 (Colo. 1992)—9:1, 14:3
- Casey v. Christie Lodge Owners Ass'n, Inc., 923 P.2d 365 (Colo. App. 1996)—9:1, 12:2, 12:3
- Casey v. Colorado Higher Educ. Ins. Benefits Alliance Trust, 2012 COA 134, 310 P.3d 196 (Colo. App. 2012)—26:5, 30:10
- Casper v. Guarantee Trust Life Insurance Company, 2016 COA 167, 421 P.3d 1184 (Colo. App. 2016)—25:2, 25:10, 25:11
- Casper v. Guarantee Trust Life Insurance Company, 2016 COA 167, 421 P.3d 1184 (Colo. App. 2016)—25:3
- Cass Company-Contractors v. Colton, 130 Colo. 593, 279 P.2d 415 (1955)—9:7A
- Cavaleri v. Anderson, 2012 COA 122, 298 P.3d 237 (Colo. App. 2012)—12:1, 12:2, 12:3

## TABLE OF CASES

- CeBuzz, Inc. v. Sniderman, 171 Colo. 246, 466 P.2d 457 (1970)—2:5, 12:6
- Cedar Lane Investments v. American Roofing Supply of Colorado Springs, Inc., 919 P.2d 879 (Colo. App. 1996)—32:4
- Ceja v. Lemire, 154 P.3d 1064 (Colo. 2007)—9:1
- Central Inv. Corp. of Denver v. Container Advertising Co., 28 Colo. App. 184, 471 P.2d 647 (App. 1970)—30:3, 30:4
- Centric-Jones Co. v. Hufnagel, 848 P.2d 942 (Colo. 1993)—30:5
- Chacon v. Scavo, 145 Colo. 222, 358 P.2d 614 (1960)—19:14
- Chaffin, Inc. v. Wallain, 689 P.2d 684 (Colo. App. 1984)—3:5A
- Chandler-McPhail v. Duffey, 194 P.3d 434 (Colo. App. 2008)—30:9
- Chandler v. Ziegler, 88 Colo. 1, 291 P. 822 (1930)—19:17
- Chapman v. Harner, 2014 CO 78, 339 P.3d 519 (Colo. 2014)—3:5, 9:17, 11:12, 14:17, 14:21, 16:6
- Chapman v. Willey, 134 P.3d 568 (Colo. App. 2006)—12:1
- Charlton v. Kimata, 815 P.2d 946 (Colo. 1991)—9:1
- Charnes v. Arnold, 198 Colo. 362, 600 P.2d 64 (1979)—21:14
- Chartier v. Winslow Crane Service Co., 142 Colo. 294, 350 P.2d 1044 (1960)—8:6, 8:7
- Chavez v. Chavez, 2020 COA 70, 465 P.3d 133 (Colo. App. 2020)—32:6
- Chavez v. Parkview Episcopal Medical Center, 32 P.3d 609 (Colo. App. 2001)—15:14, 15:15
- Chellsen v. Pena, 857 P.2d 472 (Colo. App. 1992)—31:4
- Cheney v. Hailey, 686 P.2d 808 (Colo. App. 1984)—8:1, 8:5, 8:18
- Cherokee Metropolitan Dist. v. Simpson, 148 P.3d 142 (Colo. 2006)—30:7
- Cherrington v. Woods, 132 Colo. 500, 290 P.2d 226 (1955)—19:10
- Cherry Creek Aviation, Inc. v. City of Steamboat Springs, 958 P.2d 515 (Colo. App. 1998)—30:7
- Chidester v. Eastern Gas and Fuel Associates, 859 P.2d 222 (Colo. App. 1992)—30:7
- Christensen v. Hoover, 643 P.2d 525 (Colo. 1982)—16:1, 16:5, 16:6
- Christie v. San Miguel County School Dist. R-2(J), 759 P.2d 779, 48 Ed. Law Rep. 1003 (Colo. App. 1988)—31:9
- Christmas v. Cooley, 158 Colo. 297, 406 P.2d 333 (1965)—30:35
- Christoph v. Colorado Communications Corp., 946 P.2d 519 (Colo. App. 1997)—8:1
- Chryar v. Wolf, 21 P.3d 428 (Colo. App. 2000)—6:11, 23:6
- Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988)—22:16, 22:18, 23:2, 31:4, 31:5
- Churning v. Staples, 628 P.2d 180 (Colo. App. 1981)—9:6
- Chutich v. Samuelson, 33 Colo. App. 195, 518 P.2d 1363 (App. 1973)—9:21
- Cinquanta v. Burdett, 154 Colo. 37, 388 P.2d 779, 1 A.L.R.3d 840 (1963)—22:1, 22:8, 22:12
- Cintron By and Through Cintron v. City of Colorado Springs By and Through Memorial Hosp., 886 P.2d 291 (Colo. App. 1994)—7:1
- Ciocian v. Vail Corp., 251 P.3d 1130 (Colo. App. 2010)—9:1
- Circle T Corp. v. Crocker, 155 Colo. 263, 393 P.2d 744 (1964)—30:56

- Circle T Corp. v. Deerfield, 166 Colo. 238, 444 P.2d 404 (1968)—26:2, 30:56
- City & County of Denver v. Noble, 124 Colo. 392, 237 P.2d 637 (1951)—5:2
- Citywide Banks v. Armijo, 313 P.3d 647, 75 U.C.C. Rep. Serv. 2d 789 (Colo. App. 2011)—8:11
- Clancy Systems Intern., Inc. v. Salazar, 177 P.3d 1235, 65 U.C.C. Rep. Serv. 2d 137 (Colo. 2008)—24:1
- Clare v. Florissant Water and Sanitation Dist., 879 P.2d 471 (Colo. App. 1994)—36:10
- Clark v. Bunnell, 172 Colo. 32, 470 P.2d 42 (1970)—9:13
- Clark v. People, 232 P.3d 1287 (Colo. 2010)—3:3
- Clark v. Small, 80 Colo. 227, 250 P. 385 (1926)—9:30
- Clay, In re Marriage of, 670 P.2d 31 (Colo. App. 1983)—7:2
- Clementi v. Nationwide Mut. Fire Ins. Co., 16 P.3d 223 (Colo. 2001)—25:2
- Clibon v. Wayman, 137 Colo. 495, 327 P.2d 283 (1958)—11:1
- Click v. Board of County Com'rs of County of Alamosa, 923 P.2d 347 (Colo. App. 1996)—12:15
- Climax Dairy Co. v. Mulder, 78 Colo. 407, 242 P. 666 (1925)—17:3
- Clough v. Williams Production RMT Co., 179 P.3d 32 (Colo. App. 2007)—30:38
- Clown's Den, Inc. v. Canjar, 33 Colo. App. 212, 518 P.2d 957 (App. 1973)—8:15
- Club Matrix, LLC v. Nassi, 284 P.3d 93 (Colo. App. 2011)—19:17, 30:18
- Club Valencia Homeowners Ass'n, Inc. v. Valencia Associates, 712 P.2d 1024 (Colo. App. 1985)—15:18, 19:1, 22:17
- Clyncke v. Waneka, 157 P.3d 1072 (Colo. 2007)—9:1, 13:1
- C.M. v. People, 198 Colo. 436, 601 P.2d 1364 (1979)—41:4
- Coakley v. Hayes, 121 Colo. 303, 215 P.2d 901 (1950)—3:4
- Cobai v. Young, 679 P.2d 121 (Colo. App. 1984)—18:1
- Cody Park Property Owners' Ass'n, Inc. v. Harder, 251 P.3d 1 (Colo. App. 2009)—30:9
- Coffman v. Godsoe, 142 Colo. 575, 351 P.2d 808 (1960)—9:30
- Coffman v. Seifert, 175 Colo. 224, 486 P.2d 422 (1971)—9:30
- Cohen v. Clayton Coal Co., 86 Colo. 270, 281 P. 111, 74 A.L.R. 467 (1929)—30:31
- Cohen v. Vivian, 141 Colo. 443, 349 P.2d 366, 80 A.L.R.2d 1448 (1960)—19:5, 19:11
- Cole v. Jennings, 847 P.2d 200 (Colo. App. 1992)—8:1
- Coleman v. United Fire and Cas. Co., 767 P.2d 761 (Colo. App. 1988)—25:2
- Cole's Estate, In re, 75 Colo. 264, 226 P. 143 (1924)—34:12
- Collard v. Vista Paving Corp., 2012 COA 208, 292 P.3d 1232 (Colo. App. 2012)—9:1, 12:1, 12:2, 12:3
- Collie v. Becknell, 762 P.2d 727 (Colo. App. 1988)—26:5
- Collins v. Colorado Mountain College, 56 P.3d 1132, 171 Ed. Law Rep. 338 (Colo. App. 2002)—31:4, 31:5
- Collins v. Otto, 149 Colo. 489, 369 P.2d 564 (1962)—13:1, 13:2

## TABLE OF CASES

- Colorado-Kansas Grain Co. v. Reifschneider, 817 P.2d 637, 15 U.C.C. Rep. Serv. 2d 449 (Colo. App. 1991)—14:10
- Colorado Accounting Machines, Inc. v. Mergenthaler, 44 Colo. App. 155, 609 P.2d 1125 (App. 1980)—24:5
- Colorado & S. Ry. Co. v. Honaker, 92 Colo. 239, 19 P.2d 759 (1933)—9:6
- Colorado Bridge & Const. Co. v. Preuit, 75 Colo. 107, 224 P. 222 (1924)—18:4
- Colorado Carpet Installation, Inc. v. Palermo, 668 P.2d 1384, 36 U.C.C. Rep. Serv. 1516, 45 A.L.R.4th 1113 (Colo. 1983)—14:10
- Colorado Cent. Consol. Min. Co. v. Turck, 70 F. 294 (C.C.A. 8th Cir. 1895)—18:4
- Colorado City Development Co. v. Jones-Healy Realty, Inc., 195 Colo. 114, 576 P.2d 160 (1978)—30:56
- Colorado Civil Rights Commission v. State By and Through School Dist. No. 1, Bent County, 30 Colo. App. 10, 488 P.2d 83 (App. 1971)—31:10
- Colorado Coal & Iron Co. v. Lamb, 6 Colo. App. 255, 40 P. 251 (1895)—9:18
- Colorado Coffee Bean, LLC v. Peaberry Coffee Inc., 251 P.3d 9 (Colo. App. 2010)—7:7, 8:9, 8:22, 9:4, 19:1, 19:2, 19:8, 19:9, 19:10, 29:4
- Colorado Community Bank v. Hoffman, 2013 COA 146, 338 P.3d 390 (Colo. App. 2013)—17:10
- Colorado Compensation Ins. Authority v. Jones, 131 P.3d 1074 (Colo. App. 2005)—8:4
- Colorado Compensation Ins. Authority v. Jorgensen, 992 P.2d 1156 (Colo. 2000)—6:5
- Colorado Fuel & Iron Corp. v. Industrial Commission, 148 Colo. 557, 367 P.2d 597 (1961)—5:5
- Colorado Homes, Ltd. v. Loerch-Wilson, 43 P.3d 718 (Colo. App. 2001)—6:14
- Colorado Interstate Gas Co., Inc. v. Chemco, Inc., 833 P.2d 786, 17 U.C.C. Rep. Serv. 2d 1162 (Colo. App. 1991)—19:1, 19:2, 19:5, 19:15, 30:18, 30:31, 30:38
- Colorado Inv. Services, Inc. v. Hager, 685 P.2d 1371 (Colo. App. 1984)—30:8, 30:41, 30:56
- Colorado Kenworth Corp. v. Whitworth, 144 Colo. 541, 357 P.2d 626, 97 A.L.R.2d 990 (1960)—32:2, 32:3
- Colorado Medical Soc. v. Hickenlooper, 2012 COA 121, 353 P.3d 396 (Colo. App. 2012)—15:1
- Colorado Mortg. & Inv. Co. v. Giacomini, 55 Colo. 540, 136 P. 1039 (1913)—9:19, 12:10
- Colorado Mortg. & Inv. Co. v. Rees, 21 Colo. 435, 42 P. 42 (1895)—9:19
- Colorado Mortg. Co. v. Wilson, 83 Colo. 254, 263 P. 406 (1928)—19:10
- Colorado Mountain Properties, Inc. v. Heineman, 860 P.2d 1388 (Colo. App. 1993)—36:4
- Colorado M. Ry. Co. v. Brown, 15 Colo. 193, 25 P. 87 (1890)—36:4
- Colorado Nat. Bank v. Ashcraft, 83 Colo. 136, 263 P. 23 (1927)—5:6, 30:39
- Colorado Nat. Bank of Denver v. Friedman, 846 P.2d 159 (Colo. 1993)—24:1, 30:38, 30:39

- Colorado Performance Corp. v. Mariposa Associates, 754 P.2d 401 (Colo. App. 1987)—7:3, 7:4, 19:2, 19:17, 30:23
- Colorado Permanente Medical Group, P.C. v. Evans, 926 P.2d 1218 (Colo. 1996)—6:1
- Colorado Pool Systems, Inc. v. Scottsdale Ins. Co., 2012 COA 178, 317 P.3d 1262 (Colo. App. 2012)—9:4, 25:1
- Colorado School of Mines v. Neighbors, 119 Colo. 399, 203 P.2d 904 (1949)—31:7
- Colorado Special Districts Property and Liability Pool v. Lyons, 2012 COA 18, 277 P.3d 874 (Colo. App. 2012)—25:1, 25:2
- Colorado Springs, City of v. Powell, 156 P.3d 461 (Colo. 2007)—12:15
- Colorado Springs, City of v. Powell, 48 P.3d 561 (Colo. 2002)—12:15
- Colorado Springs & Interurban Ry. Co. v. Allen, 55 Colo. 391, 135 P. 790 (1913)—9:18
- Colorado Springs Co. v. Wight, 44 Colo. 179, 96 P. 820 (1908)—19:1
- Colorado Utilities Corp. v. Casady, 89 Colo. 168, 300 P. 606 (1931)—6:3
- Colorado Utilities Corp. v. Casady, 89 Colo. 156, 300 P. 601 (1931)—6:1, 6:2, 9:9
- Colucci v. Town of Vail, 232 P.3d 218 (Colo. App. 2009)—12:15
- Columbus Investments v. Lewis, 48 P.3d 1222, 48 U.C.C. Rep. Serv. 2d 347 (Colo. 2002)—30:33
- Colwell v. Mentzer Investments, Inc., 973 P.2d 631 (Colo. App. 1998)—9:2
- Colwell v. Oatman, 32 Colo. App. 171, 510 P.2d 464 (App. 1973)—8:6, 8:7
- Combined Communications Corp., Inc. v. Public Service Co. of Colorado, 865 P.2d 893 (Colo. App. 1993)—6:1
- Comfort v. Rocky Mountain Consultants, Inc., 773 P.2d 615 (Colo. App. 1989)—9:14
- Comfort Homes, Inc. v. Peterson, 37 Colo. App. 516, 549 P.2d 1087 (App. 1976)—30:45
- Command Communications, Inc. v. Fritz Companies, Inc., 36 P.3d 182 (Colo. App. 2001)—9:1, 30:10
- Compass Bank v. Kone, 134 P.3d 500 (Colo. App. 2006)—30:7
- Compass Ins. Co. v. City of Littleton, 984 P.2d 606 (Colo. 1999)—7:4, 25:1, 30:35
- Compton v. Safeway, Inc., 169 P.3d 135 (Colo. 2007)—25:1, 25:2
- Comtrol, Inc. v. Mountain States Tel. & Tel. Co., 32 Colo. App. 384, 513 P.2d 1082 (App. 1973)—24:1
- Concerned Members of Intermountain Rural Elec. Ass'n v. District Court, Jefferson County, 713 P.2d 923 (Colo. 1986)—22:1
- Concord Realty Co. v. Continental Funding Corp., 776 P.2d 1114 (Colo. 1989)—5:4, 19:1
- Condo v. Connors, 266 P.3d 1110 (Colo. 2011)—30:31
- Condo v. Connors, 271 P.3d 524 (Colo. App. 2010)—24:1, 27:1
- Conner v. Steel, Inc., 28 Colo. App. 1, 470 P.2d 71 (App. 1970)—8:3
- Connes v. Molalla Transport System, Inc., 831 P.2d 1316 (Colo. 1992)—8:8, 8:22, 9:1
- Connes v. Molalla Transport Systems, Inc., 817 P.2d 567 (Colo. App. 1991)—9:1

## TABLE OF CASES

- Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)—28:5
- Connolly, Application of, 761 P.2d 224 (Colo. App. 1988)—7:2
- Conrad v. Imatani, 724 P.2d 89 (Colo. App. 1986)—15:1
- Constitution Associates v. New Hampshire Ins. Co., 930 P.2d 556 (Colo. 1996)—25:1
- Consumer Crusade, Inc. v. Clarion Mortg. Capital, Inc., 197 P.3d 285 (Colo. App. 2008)—29:1
- Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987)—31:4, 31:5
- Contract Maintenance Co. v. Local No. 105, Bldg. Service Emp. Intern. Union, 160 Colo. 190, 415 P.2d 855 (1966)—27:1
- Converse v. Zinke, 635 P.2d 882 (Colo. 1981)—30:12, 30:35
- Cooley v. Big Horn Harvestore Systems, Inc., 813 P.2d 736, 14 U.C.C. Rep. Serv. 2d 977 (Colo. 1991)—14:8, 14:15, 14:16
- Cooley v. Eskridge, 125 Colo. 102, 241 P.2d 851 (1952)—8:8, 8:18
- Cooley v. Paraho Development Corp., 851 P.2d 207 (Colo. App. 1992)—6:1, 9:1, 9:21
- Cooley Inv. Co. v. Jones, 780 P.2d 29 (Colo. App. 1989)—30:56
- Coon v. District Court In and For Boulder County, 161 Colo. 211, 420 P.2d 827 (1966)—30:18
- Cooper v. Cooper, 112 Colo. 140, 146 P.2d 986 (1944)—30:7
- Cooper v. U.S. Ski Ass'n, 32 P.3d 502 (Colo. App. 2000)—9:1
- Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001)—5:4
- Coopersmith v. Williams, 171 Colo. 511, 468 P.2d 739 (1970)—22:18
- Coors v. Security Life of Denver Ins. Co., 112 P.3d 59 (Colo. 2005)—5:4, 25:2, 25:11, 29:5, 29:6
- Coors v. Security Life of Denver Ins. Co., 91 P.3d 393 (Colo. App. 2003)—25:9, 29:2, 29:4, 30:10, 30:11, 30:12
- Coors Brewing Co. v. Floyd, 978 P.2d 663 (Colo. 1999)—23:1, 23:2, 31:12
- Cope v. Vermeer Sales and Service of Colorado, Inc., 650 P.2d 1307 (Colo. App. 1982)—6:11
- Copper Mountain, Inc. v. Industrial Systems, Inc., 208 P.3d 692 (Colo. 2009)—30:33
- Corbin v. Sinclair Marketing, Inc., 684 P.2d 265 (Colo. App. 1984)—31:12
- Corcoran v. Sanner, 854 P.2d 1376 (Colo. App. 1993)—15:26, 23:1, 30:39
- Corder v. Folds, 2012 COA 174, 292 P.3d 1177 (Colo. App. 2012)—12:1, 12:2
- Corder v. Laws, 148 Colo. 310, 366 P.2d 369 (1961)—19:3, 19:5, 19:17
- Core-Mark Midcontinent, Inc. v. Sonitrol Corp., 2012 COA 120, 300 P.3d 963 (Colo. App. 2012)—9:29, 9:30
- Core-Mark Midcontinent Inc. v. Sonitrol Corporation, 2016 COA 22, 370 P.3d 353 (Colo. App. 2016)—30:38, 30:39
- Cork v. Sentry Ins., 194 P.3d 422 (Colo. App. 2008)—25:2, 25:3
- Cornerstone Group XXII, L.L.C. v. Wheat Ridge Urban Renewal Authority, 151 P.3d 601 (Colo. App. 2006)—30:23
- Corporon v. Safeway Stores, Inc., 708 P.2d 1385 (Colo. App. 1985)—22:23, 24:1

- Corsentino v. Cordova, 4 P.3d 1082 (Colo. 2000)—12:15
- Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983)—9:1
- Costa v. Smith, 43 Colo. App. 251, 601 P.2d 661 (App. 1979)—22:22
- Costello v. Cook, 852 P.2d 1330 (Colo. App. 1993)—30:1
- Cotter Corp. v. American Empire Surplus Lines Ins. Co., 90 P.3d 814 (Colo. 2004)—25:1
- Coulter v. Barnes, 71 Colo. 243, 205 P. 943 (1922)—22:14, 22:16
- Coulter v. Coulter, 73 Colo. 144, 214 P. 400 (1923)—17:10
- Courvoisier v. Raymond, 23 Colo. 113, 47 P. 284 (1896)—20:12
- Cox v. Public Service Co., 30 Colo. App. 350, 494 P.2d 1302 (App. 1971)—5:6
- Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975)—28:5
- Craft v. Philadelphia Indemnity Insurance Company, 2015 CO 11, 343 P.3d 951 (Colo. 2015)—25:1
- Craghead v. McCullough, 58 Colo. 485, 146 P. 235 (1915)—15:4
- Crawford v. French, 633 P.2d 524 (Colo. App. 1981)—18:4
- Crawford Rehabilitation Services, Inc. v. Weissman, 938 P.2d 540 (Colo. 1997)—31:1, 31:4, 31:5, 31:12, 31:16
- Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co., 143 Colo. 393, 353 P.2d 1098 (1960)—24:1
- Credit Service Co., Inc. v. Dauwe, 134 P.3d 444 (Colo. App. 2005)—15:1
- Crespin v. Largo Corp., 698 P.2d 826 (Colo. App. 1984)—9:14
- Crews-Beggs Dry Goods Co. v. Bayle, 97 Colo. 568, 51 P.2d 1026 (1935)—21:1, 21:2, 21:8
- Cronk v. Intermountain Rural Elec. Ass'n, 765 P.2d 619 (Colo. App. 1988)—24:6, 30:7, 31:4, 31:5, 31:12
- Crosby v. Canino, 84 Colo. 225, 268 P. 1021 (1928)—9:15
- Crosswaith v. Thomason, 95 Colo. 240, 35 P.2d 849 (1934)—8:22
- Crowe v. Tull, 126 P.3d 196 (Colo. 2006)—15:18, 15:19, 29:1, 29:2, 29:3, 29:4
- Crown Life Ins. Co. v. Haag Ltd. Partnership, 929 P.2d 42 (Colo. App. 1996)—30:16
- Cruse v. Clawson, 137 Mont. 439, 352 P.2d 989 (1960)—30:27
- Cruz v. Farmers Ins. Exchange, 12 P.3d 307 (Colo. App. 2000)—30:31
- Crystal Homes, Inc. v. Radetsky, 895 P.2d 1179 (Colo. App. 1995)—15:21, 15:26
- Culp v. Rexnord & Booth-Rouse Equipment Co., 38 Colo. App. 1, 553 P.2d 844 (App. 1976)—14:25
- Culpepper v. Pearl Street Bldg., Inc., 877 P.2d 877 (Colo. 1994)—23:1, 23:2, 23:3
- Culver v. Samuels, 37 P.3d 535 (Colo. App. 2001)—9:1
- Cunningham v. Stender, 127 Colo. 293, 255 P.2d 977 (1953)—34:11
- Curnow v. Yarbrough, 676 P.2d 1177 (Colo. 1984)—35:1
- Curtis Pub. Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967)—22:1, 22:3, 22:27
- Cyprus Amax Minerals Co. v. Lexington Ins. Co., 74 P.3d 294 (Colo. 2003)—25:1

## TABLE OF CASES

### D

- Daigle v. Prather, 152 Colo. 115, 380 P.2d 670 (1963)—11:13
- Dale v. Guaranty Nat. Ins. Co., 948 P.2d 545 (Colo. 1997)—25:1, 25:2, 25:4, 25:6, 25:8
- Daley v. University of Colorado Health Sciences Center, 111 P.3d 554 (Colo. App. 2005)—12:15
- Dallas Creek Water Co. v. Huey, 933 P.2d 27 (Colo. 1997)—7:7
- Dalton v. Miller, 984 P.2d 666 (Colo. App. 1999)—15:2
- Daly v. Aspen Center for Women's Health, Inc., 134 P.3d 450 (Colo. App. 2005)—8:12, 8:18, 8:22, 15:1
- Damian v. Mountain Parks Elec., Inc., 2012 COA 217, 310 P.3d 242 (Colo. App. 2012)—29:1
- Damon, Matter of Estate of, 915 P.2d 1301 (Colo. 1996)—25:2
- DA Mountain Rentals, LLC v. The Lodge at Lionshead Phase III Condominium Association Inc., 2016 COA 141, 409 P.3d 564 (Colo. App. 2016)—8:1
- Dana's Housekeeping v. Butterfield, 807 P.2d 1218 (Colo. App. 1990)—8:5
- D & D Fuller CATV Const., Inc. v. Pace, 780 P.2d 520 (Colo. 1989)—23:1
- Dandrea v. Board of County Com'rs of El Paso County, 144 Colo. 343, 356 P.2d 893 (1960)—18:4
- Daniel v. City of Colorado Springs, 2014 CO 34, 327 P.3d 891 (Colo. 2014)—12:15
- Daniels v. Stock, 21 Colo. App. 651, 126 P. 281 (1912)—22:18
- Danko v. Conyers, 2018 COA 14, 432 P.3d 958 (Colo. App. 2018)—9:20, 9:24, 15:1
- Dann v. Perrotti & Hauptman Development Co., 670 P.2d 448 (Colo. App. 1983)—19:1, 19:17, 30:55
- Danyew v. Phelps, 676 P.2d 707 (Colo. App. 1983)—23:2
- Dare v. Sobule, 674 P.2d 960 (Colo. 1984)—5:2, 9:6
- Daugherty v. Allstate Ins. Co., 55 P.3d 224 (Colo. App. 2002)—25:1, 25:2, 25:8
- Davenport v. Community Corrections of Pikes Peak Region, Inc., 962 P.2d 963 (Colo. 1998)—9:1, 9:14
- Davies v. Bradley, 676 P.2d 1242 (Colo. App. 1983)—30:54, 30:55
- Davis v. American Nat. Bank of Denver, 149 Colo. 34, 367 P.2d 325 (1961)—32:2
- Davis v. Caterpillar Tractor Co., 719 P.2d 324 (Colo. App. 1985)—14:3, 14:4, 14:7
- Davis v. Davis, 64 Colo. 62, 170 P. 208 (1917)—34:15
- Davis v. Fortino & Jackson Chevrolet Co., 32 Colo. App. 222, 510 P.2d 1376 (App. 1973)—6:10
- Davis v. Lira, 817 P.2d 539 (Colo. App. 1991)—11:12
- Davis v. Marr, 160 Colo. 27, 413 P.2d 707 (1966)—12:11
- Davis v. M.L.G. Corp., 712 P.2d 985 (Colo. 1986)—30:16
- Davis v. Roberts, 155 Colo. 387, 395 P.2d 13 (1964)—13:1
- Dawe v. Hoskins, 77 Colo. 501, 238 P. 50 (1925)—30:8
- Dawley v. Dawley's Estate, 60 Colo. 73, 152 P. 1171 (1915)—30:7

- Day v. Johnson, 255 P.3d 1064 (Colo. 2011)—4:1, 15:1, 15:4
- Daybreak Const. Specialties, Inc. v. Saghatoleslami, 712 P.2d 1028 (Colo. App. 1985)—30:10, 30:15, 30:56
- DC-10 Entertainment, LLC v. Manor Insurance Agency, Inc., 2013 COA 14, 308 P.3d 1223 (Colo. App. 2013)—9:4, 25:1
- DCB Const. Co., Inc. v. Central City Development Co., 940 P.2d 958 (Colo. App. 1996)—9:4
- D.C. Concrete Management, Inc. v. Mid-Century Ins. Co., 39 P.3d 1205 (Colo. App. 2001)—30:35
- Deacon v. American Plant Food Corp., 782 P.2d 861, 9 U.C.C. Rep. Serv. 2d 538 (Colo. App. 1989)—9:14, 14:10, 14:11, 14:13, 14:14, 14:19, 18:4
- deBoer v. Jones, 996 P.2d 754 (Colo. App. 2000)—12:1, 12:2, 12:3
- deBoer v. Ute Water Conservancy Dist., 17 P.3d 187 (Colo. App. 2000)—12:15
- DeBose By and Through DeBose v. Bear Valley Church of Christ, 890 P.2d 214 (Colo. App. 1994)—6:14, 8:14, 9:1, 9:22
- DeCicco v. Trinidad Area Health Ass’n, 40 Colo. App. 63, 573 P.2d 559 (App. 1977)—23:2, 23:4
- Decker v. Browning-Ferris Industries of Colorado, Inc., 947 P.2d 937 (Colo. 1997)—5:4, 31:1
- Decker v. Browning-Ferris Industries of Colorado, Inc., 931 P.2d 436 (Colo. 1997)—5:4, 30:16, 31:1
- DeCordova v. State, 878 P.2d 73 (Colo. App. 1994)—15:2
- Deeb v. Canniff, 29 Colo. App. 510, 488 P.2d 93 (App. 1971)—32:2
- Defeyter v. Riley, 671 P.2d 995 (Colo. App. 1983)—5:4
- DeForrest v. City of Cherry Hills Village, 990 P.2d 1139 (Colo. App. 1999)—12:15
- DeJean v. United Airlines, Inc., 839 P.2d 1153 (Colo. 1992)—30:20
- Delk v. City of Grand Junction, 958 P.2d 532 (Colo. App. 1998)—12:15
- Delluomo, In Interest of v. Cedarblade, 2014 COA 43, 328 P.3d 291 (Colo. App. 2014)—26:3, 26:5
- Deming v. Kellogg, 41 Colo. App. 264, 583 P.2d 944 (App. 1978)—23:2
- Denberg v. Loretto Heights College, 694 P.2d 375, 22 Ed. Law Rep. 998 (Colo. App. 1984)—19:4
- Denmark v. State, 954 P.2d 624, 125 Ed. Law Rep. 891 (Colo. App. 1997)—12:15
- Dennis v. City and County of Denver, 2016 COA 140, 419 P.3d 997 (Colo. App. 2016)—12:15
- Denny Const., Inc. v. City and County of Denver ex rel. Bd. of Water Com’rs, 199 P.3d 742 (Colo. 2009)—5:6, 30:39
- Denver, City and County of v. Caton, 108 Colo. 170, 114 P.2d 553 (1941)—12:16
- Denver, City and County of v. DeLong, 190 Colo. 219, 545 P.2d 154, 82 A.L.R.3d 1278 (1976)—9:14
- Denver, City and County of v. Dennis, 2018 CO 37, 418 P.3d 489 (Colo. 2018)—12:15
- Denver, City and County of v. Fey Concert Co., 960 P.2d 657 (Colo. 1998)—8:1

## TABLE OF CASES

- Denver, City and County of v. Hinsey, 177 Colo. 178, 493 P.2d 348 (1972)—36:10
- Denver, City and County of v. Kennedy, 29 Colo. App. 15, 476 P.2d 762 (App. 1970)—13:1, 13:2
- Denver, City and County of v. Quick, 108 Colo. 111, 113 P.2d 999, 134 A.L.R. 1120 (1941)—36:10
- Denver, City and County of v. Willson, 81 Colo. 134, 254 P. 153 (1927)—12:16
- Denver & R. G. R. Co. v. Komfala, 69 Colo. 318, 194 P. 615 (1920)—12:17
- Denver & R. G. R. Co. v. Warring, 37 Colo. 122, 86 P. 305 (1906)—3:16
- Denver Business Sales Co. v. Lewis, 148 Colo. 293, 365 P.2d 895 (1961)—19:1, 19:5
- Denver By and Through Bd. of Water Com'rs, City and County of v. Gallegos, 916 P.2d 509 (Colo. 1996)—12:15
- Denver City Tramway Co. v. Brown, 57 Colo. 484, 143 P. 364 (1914)—9:1, 9:25
- Denver City Tramway Co. v. Hills, 50 Colo. 328, 116 P. 125 (1911)—6:1
- Denver City Tramway Co. v. Kennedy, 50 Colo. 418, 117 P. 167 (1911)—1:2
- Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 P. 39 (1903)—9:7
- Denver Consol. Elec. Co. v. Simpson, 21 Colo. 371, 41 P. 499 (1895)—9:7
- Denver Dry Goods Co. v. Pender, 128 Colo. 281, 262 P.2d 257 (1953)—12:6
- Denver Equipment Co. v. Newell, 115 Colo. 23, 169 P.2d 174 (1946)—11:2
- Denver Industrial Corp. v. Kesselring, 90 Colo. 295, 8 P.2d 767 (1932)—30:7
- Denver Joint Stock Land Bank v. Markham, 106 Colo. 509, 107 P.2d 313 (1940)—30:36
- Denver 1500, Inc. v. Wall, 43 Colo. App. 282, 602 P.2d 903 (App. 1979)—30:56
- Denver Pub. Co. v. Bueno, 54 P.3d 893 (Colo. 2002)—22:1, 22:2, 28:1, 28:10
- Denver Pub. Co. v. Kirk, 729 P.2d 1004 (Colo. App. 1986)—30:39
- Denver Public Warehouse Co. v. Holloway, 34 Colo. 432, 83 P. 131 (1905)—22:18
- Denver, S.P. & P.R. Co. v. Conway, 8 Colo. 1, 5 P. 142 (1884)—8:15, 8:22
- Denver, T. & Ft. W.R. Co. v. Dotson, 20 Colo. 304, 38 P. 322 (1894)—18:4
- Denver Tramway Co. v. Orbach, 64 Colo. 511, 172 P. 1063 (1918)—7:5
- Denver Tramway Corp. v. Callahan, 112 Colo. 460, 150 P.2d 798 (1944)—12:4
- Denver Tramway Corp. v. Garcia, 154 Colo. 417, 390 P.2d 952 (1964)—12:4
- Denver Tramway Corp. v. Gentry, 82 Colo. 51, 256 P. 1088 (1927)—6:1
- Denver Truck Exchange v. Perryman, 134 Colo. 586, 307 P.2d 805 (1957)—30:1

- Denver Urban Renewal Authority v. Berglund-Cherne Co., 193 Colo. 562, 568 P.2d 478 (1977)—36:7, 36:9, 36:10
- Denver Urban Renewal Authority v. Cook, 186 Colo. 182, 526 P.2d 652 (1974)—36:10
- Denver Urban Renewal Authority v. Pogzeba, 38 Colo. App. 168, 558 P.2d 442 (App. 1976)—36:3
- Denver Ventures, Inc. v. Arlington Lane Corp., 754 P.2d 785 (Colo. App. 1988)—30:12, 30:46
- Department of Admin. v. State Personnel Bd. of State, 703 P.2d 595 (Colo. App. 1985)—22:17
- Department of Health v. Donahue, 690 P.2d 243 (Colo. 1984)—31:4
- Department of Health, State of Colo. v. Hecla Min. Co., 781 P.2d 122 (Colo. App. 1989)—36:3
- Department of Highways v. Schulhoff, 167 Colo. 72, 445 P.2d 402 (1968)—36:3, 36:6, 36:8
- Department of Human Services v. State Personnel Board, 2016 COA 37, 371 P.3d 748 (Colo. App. 2016)—6:1
- Department of Natural Resources v. 5 Star Feedlot Inc., 2019 COA 162M, 2019 WL 5444307 (Colo. App. 2019)—32:4
- Department of Transp. v. First Place, LLC, 148 P.3d 261 (Colo. App. 2006)—30:7
- Department of Transp. of State v. Marilyn Hickey Ministries, 159 P.3d 111 (Colo. 2007)—36:5
- Department of Transp., State of Colo. v. First Interstate Commercial Mortg. Co., 881 P.2d 473 (Colo. App. 1994)—36:4
- DeRubis v. Broadmoor Hotel, Inc., 772 P.2d 681 (Colo. App. 1989)—31:4
- Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988)—8:8, 8:22, 15:25, 23:2, 26:1, 26:2
- Devenyns v. Hartig, 983 P.2d 63 (Colo. App. 1998)—3:5, 11:10
- Dewey v. Hardy, 917 P.2d 305 (Colo. App. 1995)—10:3
- De Witt v. Hill, 143 Colo. 372, 353 P.2d 81 (1960)—13:1
- DeWitt v. Tara Woods LP, 214 P.3d 466 (Colo. App. 2008)—12:1, 12:2, 12:3
- Dickey v. Waggoner, 108 Colo. 197, 114 P.2d 1097 (1941)—30:56
- Dickinson v. Lincoln Building Corporation, 2015 COA 170M, 378 P.3d 797 (Colo. App. 2015)—9:14, 9:23
- DiFrancesco v. Particle Interconnect Corp., 39 P.3d 1243 (Colo. App. 2001)—30:1
- Digital Landscape Inc. v. Media Kings LLC, 2018 COA 142, 440 P.3d 1200 (Colo. App. 2018)—8:1, 8:5, 8:18, 8:19, 8:20, 8:21
- DiLeo v. Koltnow, 200 Colo. 119, 613 P.2d 318 (1980)—22:1, 22:3
- Dillingham v. Greeley Pub. Co., 701 P.2d 27 (Colo. 1985)—22:23
- Dillon v. Sterling Rendering Works, 106 Colo. 407, 106 P.2d 358 (1940)—10:3
- Dilts v. Baker, 162 Colo. 568, 427 P.2d 882 (1967)—11:12
- DiPaolo v. Boulder Valley School Dist., RE-2, 902 P.2d 439, 103 Ed. Law Rep. 834 (Colo. App. 1995)—12:15
- DISH Network Corp. v. Altomari, 224 P.3d 362 (Colo. App. 2009)—30:34
- Dittbrenner v. Myerson, 114 Colo. 448, 167 P.2d 15 (1946)—34:18

## TABLE OF CASES

- Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103, 33 A.L.R.4th 193 (Colo. 1982)—22:1, 22:3
- Dixon v. Bowen, 85 Colo. 194, 274 P. 824 (1929)—27:2
- Docheff v. City of Broomfield, 623 P.2d 69 (Colo. App. 1980)—18:1
- Dodds v. Frontier Chevrolet Sales & Service, Inc., 676 P.2d 1237 (Colo. App. 1983)—19:17, 29:1
- Doe v. High-Tech Institute, Inc., 972 P.2d 1060, 132 Ed. Law Rep. 989, 77 A.L.R.5th 755 (Colo. App. 1998)—28:1, 28:2, 28:13, 28:14
- Doenges-Long Motors, Inc. v. Gillen, 138 Colo. 31, 328 P.2d 1077 (1958)—30:21
- Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972)—11:10
- Dolton v. Capitol Federal Sav. and Loan Ass'n, 642 P.2d 21 (Colo. App. 1981)—24:1, 24:5, 24:6, 26:2, 26:3, 26:4
- Dominguez v. Babcock, 727 P.2d 362, 35 Ed. Law Rep. 791 (Colo. 1986)—22:18, 22:22
- Dominguez v. Babcock, 696 P.2d 338, 23 Ed. Law Rep. 765 (Colo. App. 1984)—22:18
- Donahue v. Pikes Peak Auto. Co., 150 Colo. 281, 372 P.2d 443 (1962)—5:6
- Doran v. Jensen, 504 P.2d 354 (Colo. App. 1972)—11:5
- Dorman v. Petrol Aspen, Inc., 914 P.2d 909 (Colo. 1996)—30:30, 31:1, 31:2, 31:4
- Dorr v. C.B. Johnson, Inc., 660 P.2d 517 (Colo. App. 1983)—22:1, 22:17
- Dorris v. San Luis Valley Finance Co., 90 Colo. 209, 7 P.2d 407 (1932)—32:1
- Dorsey & Whitney LLP v. RegScan, Inc., 2018 COA 21, 2018 WL 1007942 (Colo. App. 2018)—30:10
- Dotson v. Bernstein, 207 P.3d 911 (Colo. App. 2009)—15:1
- Double Oak Const., L.L.C. v. Cornerstone Development Intern., L.L.C., 97 P.3d 140 (Colo. App. 2003)—5:4, 27:1
- Douglas v. City and County of Denver, 203 P.3d 615 (Colo. App. 2008)—12:15
- Downing v. Overhead Door Corp., 707 P.2d 1027 (Colo. App. 1985)—14:4, 14:5, 14:5B, 14:17
- D.P.H. v. J.L.B., 260 P.3d 320 (Colo. 2011)—41:6
- Drake v. Hodges, 114 Colo. 10, 161 P.2d 338 (1945)—11:10
- Draper v. DeFrenchi-Gordineer, 282 P.3d 489 (Colo. App. 2011)—6:5, 9:1, 9:2, 30:31
- Dreier v. Sherwood, 77 Colo. 539, 238 P. 38 (1925)—30:13, 30:24
- D.R. Horton, Inc.-Denver v. Bischof & Coffman Construction, LLC, 217 P.3d 1262 (Colo. App. 2009)—30:10, 30:12, 30:15
- Dubois v. Myers, 684 P.2d 940 (Colo. App. 1984)—13:1
- Duggan v. Board of County Com'rs of County of Weld, 747 P.2d 6 (Colo. App. 1987)—6:13
- Dumont v. Teets, 128 Colo. 395, 262 P.2d 734 (1953)—8:5
- Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985)—22:1
- Dunbar v. Olivieri, 97 Colo. 381, 50 P.2d 64 (1935)—9:14, 12:4
- Duncan v. Schuster-Graham Homes, Inc., 194 Colo. 441, 578 P.2d 637 (1978)—30:54

- Dunlap v. Colorado Springs Cablevision, Inc., 799 P.2d 416 (Colo. App. 1990)—9:14
- Dunn v. American Family Ins., 251 P.3d 1232 (Colo. App. 2010)—9:1, 25:1, 25:8
- Duntun v. Stemme, 117 Colo. 327, 187 P.2d 593 (1947)—30:56
- Dupont v. Preston, 9 P.3d 1193 (Colo. App. 2000)—15:16
- Dupre v. Allstate Ins. Co., 62 P.3d 1024 (Colo. App. 2002)—25:2, 30:16
- Durango Transp., Inc. v. City of Durango, 786 P.2d 428 (Colo. App. 1989)—30:13
- Dutton Hotel Co. v. Fitzpatrick, 69 Colo. 229, 193 P. 549 (1920)—32:1
- Dworak v. Olson Const. Co., 191 Colo. 161, 551 P.2d 198 (1976)—8:18
- Dyer v. Johnson, 757 P.2d 178 (Colo. App. 1988)—8:10, 8:11

**E**

- E-470 Public Highway Authority v. 455 Co., 3 P.3d 18 (Colo. 2000)—36:4
- E-470 Public Highway Authority v. Revenig, 91 P.3d 1038 (Colo. 2004)—36:2
- E-21 Engineering, Inc. v. Steve Stock & Associates, Inc., 252 P.3d 36 (Colo. App. 2010)—30:2
- Eads v. Dearing, 874 P.2d 474 (Colo. App. 1993)—5:4
- East-Larimer County Water Dist. v. Centric Corp., 693 P.2d 1019 (Colo. App. 1984)—30:4
- East Meadows Co., LLC v. Greeley Irr. Co., 66 P.3d 214 (Colo. App. 2003)—9:1, 30:9
- Easton v. 1738 Partnership, 854 P.2d 1362 (Colo. App. 1993)—9:1, 9:14
- Ebrahimi v. E.F. Hutton & Co., Inc., 794 P.2d 1015 (Colo. App. 1989)—9:4, 30:25
- E.B. Roberts Const. Co. v. Concrete Contractors, Inc., 704 P.2d 859 (Colo. 1985)—30:9
- E.D., People ex rel., 221 P.3d 65 (Colo. App. 2009)—41:1
- Eddy v. McAninch, 141 Colo. 223, 347 P.2d 499 (1959)—11:13
- Edwards v. Price, 191 Colo. 46, 550 P.2d 856 (1976)—7:4
- Ehrlich Feedlot, Inc. v. Oldenburg, 140 P.3d 265 (Colo. App. 2006)—15:1, 15:21, 32:6
- Ekberg v. Greene, 196 Colo. 494, 588 P.2d 375 (1978)—9:20
- Electrolux Corp. v. Lawson, 654 P.2d 340 (Colo. App. 1982)—24:1, 24:5, 24:6, 27:1, 32:1
- Elgin v. Bartlett, 994 P.2d 411 (Colo. 1999)—6:3, 6:5, 7:1
- Elijah v. Fender, 674 P.2d 946 (Colo. 1984)—5:7, 26:5
- Elk River Associates v. Huskin, 691 P.2d 1148 (Colo. App. 1984)—19:16, 19:17, 30:18
- Elliott v. Joyce, 889 P.2d 43, 53 A.L.R.5th 791 (Colo. 1994)—30:35
- Ellis v. Buckley, 790 P.2d 875 (Colo. App. 1989)—23:1, 23:2
- Ellis v. Town of Estes Park, 66 P.3d 178 (Colo. App. 2002)—12:15
- Emenyonu v. State Farm Fire and Cas. Co., 885 P.2d 320 (Colo. App. 1994)—25:2, 26:2
- Employment Television Enterprises, LLC v. Barocas, 100 P.3d 37 (Colo. App. 2004)—24:1

## TABLE OF CASES

- Emrich v. Joyce's Submarine Sandwiches, Inc., 751 P.2d 651 (Colo. App. 1987)—30:40
- Engler v. Hatch, 472 P.2d 680 (Colo. App. 1970)—18:1
- Englewood, City of v. Bryant, 100 Colo. 552, 68 P.2d 913 (1937)—6:1
- Englewood, City of v. Denver Waste Transfer, L.L.C., 55 P.3d 191 (Colo. App. 2002)—36:7
- English v. Griffith, 99 P.3d 90 (Colo. App. 2004)—23:1, 23:2
- Enright v. Groves, 39 Colo. App. 39, 560 P.2d 851 (App. 1977)—21:18, 23:2
- Equitable Life Ins. Co. of Iowa v. Verploeg, 123 Colo. 246, 227 P.2d 333 (1951)—30:27
- Equitex, Inc. v. Ungar, 60 P.3d 746 (Colo. App. 2002)—26:2
- Erdenberger, Inc. v. Partek North America, Inc., 865 P.2d 850 (Colo. App. 1993)—30:31
- Erickson v. Oberlohr, 749 P.2d 996 (Colo. App. 1987)—19:1, 30:54
- Ervin v. Amoco Oil Co., 885 P.2d 246 (Colo. App. 1994)—24:7
- Esecson v. Bushnell, 663 P.2d 258, 35 U.C.C. Rep. Serv. 888 (Colo. App. 1983)—30:27
- Espander v. Cramer, 903 P.2d 1171 (Colo. App. 1995)—15:1, 15:7, 15:10, 15:11, 15:13
- Espinosa v. Sheridan United Tire, 655 P.2d 424 (Colo. App. 1982)—23:1, 23:4
- Espinoza v. Gurule, 144 Colo. 381, 356 P.2d 891 (1960)—10:3
- Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981)—27:2
- Esquibel v. City and County of Denver, 112 Colo. 546, 151 P.2d 757 (1944)—12:4
- Eurpac Service Inc. v. Republic Acceptance Corp., 37 P.3d 447, 42 U.C.C. Rep. Serv. 2d 456 (Colo. App. 2000)—5:4
- Evans v. Colorado Ute Elec. Ass'n, Inc., 653 P.2d 63 (Colo. App. 1982)—18:4
- Evenson v. Colorado Farm Bureau Mut. Ins. Co., 879 P.2d 402 (Colo. App. 1993)—31:4, 31:5, 31:9
- Everett v. Dickinson & Co., Inc., 929 P.2d 10 (Colo. App. 1996)—30:9
- Ewing v. Colorado Farm Mut. Cas. Co., 133 Colo. 447, 296 P.2d 1040 (1956)—30:25
- Exchange Nat. Bank of Colorado Springs v. Cullum, 114 Colo. 26, 161 P.2d 336 (1945)—17:9

## F

- Fabling v. Jones, 108 Colo. 144, 114 P.2d 1100 (1941)—9:13
- Fagerberg v. Webb, 678 P.2d 544 (Colo. App. 1983)—30:39
- Failing v. Burlington Northern R. Co., 815 P.2d 974 (Colo. App. 1991)—6:1
- Fain v. People, 2014 CO 69, 329 P.3d 270 (Colo. 2014)—4:3
- Fair v. Red Lion Inn, 943 P.2d 431 (Colo. 1997)—5:2, 31:7, 31:8
- Fair v. Red Lion Inn, 920 P.2d 820 (Colo. App. 1995)—30:10, 31:4
- Fair Bowl, Inc. v. Brunswick Corp., 502 P.2d 957 (Colo. App. 1972)—32:3
- Falcon Broadband, Inc. v. Banning Lewis Ranch Metropolitan District

- No. 1, 2018 COA 92, 474 P.3d 1231 (Colo. App. 2018)—24:1, 27:1, 30:10
- Farmer v. Central Bancorporation, Inc., 761 P.2d 220 (Colo. App. 1988)—31:12
- Farmers Group, Inc. v. Trimble, 768 P.2d 1243 (Colo. App. 1988)—5:4, 25:9, 25:11
- Farmers Group, Inc. v. Trimble, 691 P.2d 1138 (Colo. 1984)—25:1, 25:3, 25:8
- Farmers Group, Inc. v. Trimble, 658 P.2d 1370 (Colo. App. 1982)—23:2, 25:9
- Farmers Group, Inc. v. Williams, 805 P.2d 419 (Colo. 1991)—5:4, 25:2, 31:12
- Farmers' Life Ins. Co. v. Wehrle, 63 Colo. 279, 165 P. 763 (1917)—22:10
- Farmers' Reservoir & Irrigation Co. v. Cooper, 54 Colo. 402, 130 P. 1004 (1913)—36:10
- Farmers' Reservoir & Irrigation Co. v. Fulton Inv. Co., 81 Colo. 69, 255 P. 449 (1927)—8:5
- Farmland Mut. Ins. Companies v. Chief Industries, Inc., 170 P.3d 832 (Colo. App. 2007)—9:20, 14:27
- Farrar v. Total Petroleum, Inc., 799 P.2d 463 (Colo. App. 1990)—36:9
- Fasing v. LaFond, 944 P.2d 608 (Colo. App. 1997)—19:1, 24:1
- Fay v. Kroblin Refrigerated Xpress, Inc., 644 P.2d 68 (Colo. App. 1981)—9:6
- Fearnley v. De Mainville, 5 Colo. App. 441, 39 P. 73 (1895)—30:7
- Federal Deposit Ins. Corp. v. Fisher, 2013 CO 5, 292 P.3d 934 (Colo. 2013)—30:31
- Federal Ins. Co. v. Ferrellgas, Inc., 961 P.2d 511 (Colo. App. 1997)—18:4
- Federal Ins. Co. v. Public Service Co., 194 Colo. 107, 570 P.2d 239 (1977)—9:7
- Fegley's Estate, Matter of, 42 Colo. App. 47, 589 P.2d 80 (App. 1978)—34:6
- Feit v. Donahue, 826 P.2d 407 (Colo. App. 1992)—19:5, 19:14, 19:17
- Felder v. Union Pacific R. Co., 660 P.2d 911 (Colo. App. 1982)—9:22
- Felger v. Larimer County Bd. of County Com'rs, 776 P.2d 1169 (Colo. App. 1989)—9:1
- Fellows v. Cantrell, 143 Colo. 126, 352 P.2d 289 (1960)—30:21
- Ferguson v. Hurford, 132 Colo. 507, 290 P.2d 229 (1955)—11:15, 11:16
- Ferguson v. Spalding Rehabilitation, LLC, 2019 COA 93, 456 P.3d 59 (Colo. App. 2019)—10:3
- Ferguson v. Turner, 69 Colo. 504, 194 P. 1103 (1921)—32:1
- Ferraro v. Frias Drywall, LLC, 2019 COA 123, 451 P.3d 1255 (Colo. App. 2019)—9:1
- Ferrell v. Glenwood Brokers, Ltd., 848 P.2d 936 (Colo. 1993)—29:5
- Ferrer v. Okbamicael, 2017 CO 14M, 390 P.3d 836 (Colo. 2017)—5:4, 8:22, 9:1, 9:22
- Ferrera v. Nielsen, 799 P.2d 458 (Colo. App. 1990)—31:4
- Fey Concert Co. v. City and County of Denver, 940 P.2d 972 (Colo. App. 1996)—7:4, 8:9
- Fibreboard Corp. v. Fenton, 845 P.2d 1168 (Colo. 1993)—14:3, 14:4, 14:6, 14:17, 14:19

# TABLE OF CASES

- Filatov v. Turnage, 2019 COA 120, 451 P.3d 1263 (Colo. App. 2019)—8:15
- Filho v. Rodriguez, 36 P.3d 199 (Colo. App. 2001)—8:1, 8:2, 8:3
- Finance Corp. v. King, 150 Colo. 13, 370 P.2d 432 (1962)—32:1
- Fink v. Combined Communications Corp., 679 P.2d 1108 (Colo. App. 1984)—22:3
- Finnigan v. Sandoval, 43 Colo. App. 219, 600 P.2d 123 (App. 1979)—9:22
- Fire Ins. Exchange v. Bentley, 953 P.2d 1297 (Colo. App. 1998)—25:1
- Fire Ins. Exchange v. Rael by Rael, 895 P.2d 1139 (Colo. App. 1995)—30:31
- Fire Ins. Exchange v. Sullivan, 224 P.3d 348 (Colo. App. 2009)—25:1, 28:1, 28:5
- First Interstate Bank of Denver, N.A. v. Berenbaum, 872 P.2d 1297 (Colo. App. 1993)—9:4, 15:22, 30:26
- First Nat. Bank in Lamar v. Collins, 44 Colo. App. 228, 616 P.2d 154 (App. 1980)—9:4
- First Nat. Bank of Meeker v. Theos, 794 P.2d 1055 (Colo. App. 1990)—26:2, 26:3, 26:4, 34:18
- First Nat. Bank of Windsor v. Gilbert Marshall & Co., 780 P.2d 73, 9 U.C.C. Rep. Serv. 2d 715 (Colo. App. 1989)—5:2
- First National Bank of Durango v. Lyons, 2015 COA 19, 349 P.3d 1161 (Colo. App. 2015)—19:1
- Fischer v. Moore, 183 Colo. 392, 517 P.2d 458 (1973)—6:7, 9:6
- Fiscus v. Liberty Mortgage Corporation, 2014 COA 79, 373 P.3d 644, 83 U.C.C. Rep. Serv. 2d 1014 (Colo. App. 2014)—8:14
- Fisher v. State Farm Mutual Automobile Insurance Company, 2015 COA 57, 419 P.3d 985 (Colo. App. 2015)—25:2, 25:4, 25:5, 25:10
- Fishman v. Kotts, 179 P.3d 232 (Colo. App. 2007)—9:14, 13:1
- Fitzgerald v. Edelen, 623 P.2d 418 (Colo. App. 1980)—5:4, 9:4, 31:8
- Fitzgerald v. McDonald, 81 Colo. 413, 255 P. 989 (1927)—19:7
- Flader v. Smith, 116 Colo. 322, 181 P.2d 464, 172 A.L.R. 1335 (1947)—17:3
- Flatiron Paving Co. v. Wilkin, 725 P.2d 103 (Colo. App. 1986)—8:2, 8:3
- Fleming v. Lentz, Evans, and King, P.C., 873 P.2d 38 (Colo. App. 1994)—15:18, 15:19, 15:21
- Fleming v. Scott, 141 Colo. 449, 348 P.2d 701 (1960)—30:49
- Fletcher v. Garrett, 167 Colo. 60, 445 P.2d 401 (1968)—30:56
- Fletcher v. Porter, 754 P.2d 788 (Colo. App. 1988)—9:1, 9:9, 9:25
- Fleury v. IntraWest Winter Park Operations Corporation, 2016 CO 41, 372 P.3d 349 (Colo. 2016)—9:1
- Flickinger v. Ninth Dist. Production Credit Ass'n of Wichita, Kan., 824 P.2d 19 (Colo. App. 1991)—25:2
- Flora v. Hoeft, 71 Colo. 273, 206 P. 381 (1922)—19:17
- Florence Oil & Refining Co. v. Huff, 14 Colo. App. 281, 59 P. 624 (1900)—17:5
- Flores v. American Pharmaceutical Services, Inc., 994 P.2d 455 (Colo. App. 1999)—31:12
- Flores v. Colorado Dept. of Corrections, 3 P.3d 464 (Colo. App. 1999)—12:15

- Florida Star, *The v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989)—28:5
- Floyd v. Coors Brewing Co., 952 P.2d 797 (Colo. App. 1997)—30:7, 31:4
- Fluid Technology, Inc. v. CVJ Axles, Inc., 964 P.2d 614 (Colo. App. 1998)—9:4
- Foiles, *In re Estate of*, 2014 COA 104, 338 P.3d 1098 (Colo. App. 2014)—26:1
- Folck v. Haser, 164 Colo. 11, 432 P.2d 245 (1967)—9:1, 9:13
- Foose v. Haymond, 135 Colo. 275, 310 P.2d 722 (1957)—15:2
- Ford v. Board of County Com'rs of Saguache County, 677 P.2d 358 (Colo. App. 1983)—4:3, 6:10, 10:4
- Ford Motor Co. v. Conrardy, 29 Colo. App. 577, 488 P.2d 219 (App. 1971)—6:1
- Ford Motor Co. v. E. E. O. C., 458 U.S. 219, 102 S. Ct. 3057, 73 L. Ed. 2d 721 (1982)—31:8
- Forest City Stapleton Inc. v. Rogers, 2017 CO 23, 393 P.3d 487 (Colo. 2017)—9:1, 30:54
- Forest View Company v. Town of Monument, 2020 CO 52, 464 P.3d 774 (Colo. 2020)—36:3, 36:6
- Forfar v. Wal-Mart Stores, Inc., 2018 COA 125, 436 P.3d 580 (Colo. App. 2018)—6:1
- Forman v. Brown, 944 P.2d 559 (Colo. App. 1996)—9:30, 30:22
- Former TCHR, LLC v. First Hand Management LLC, 2012 COA 129, 317 P.3d 1226 (Colo. App. 2012)—32:1
- Forsyth v. Associated Grocers of Colorado, Inc., 724 P.2d 1360 (Colo. App. 1986)—19:1, 19:17
- Foster v. Board of Governors of the Colorado State University System by and on behalf of Colorado State University, 2014 COA 18, 342 P.3d 497, 314 Ed. Law Rep. 550 (Colo. App. 2014)—16:1, 16:5, 16:6, 30:10
- Foster v. O'Farrell, 75 Colo. 170, 225 P. 217 (1924)—19:1, 19:8
- Foster v. Redd, 128 P.3d 316 (Colo. App. 2005)—9:14
- Foster v. Redding, 97 Colo. 4, 45 P.2d 940 (1935)—9:30
- Foster, *In re*, 253 P.3d 1244 (Colo. 2011)—17:10
- Foster ex rel. Foster v. Phillips, 6 P.3d 791 (Colo. App. 1999)—2:4
- Fountain v. Mojo, 687 P.2d 496 (Colo. App. 1984)—30:39
- Fountain, City of v. Gast, 904 P.2d 478 (Colo. 1995)—9:7
- Fowler Irrevocable Trust 1992-1 v. City of Boulder, 17 P.3d 797 (Colo. 2001)—36:2
- Fox v. Martens, 132 Colo. 208, 286 P.2d 628 (1955)—12:17
- F. Poss Farms, Inc. v. Miller, 35 Colo. App. 152, 529 P.2d 1343 (App. 1974)—30:43
- Francen v. Colorado Dept. of Revenue, Div. of Motor Vehicles, 2012 COA 110, 411 P.3d 693 (Colo. App. 2012)—11:3
- Francis v. Steve Johnson Pontiac-GMC-Jeep, Inc., 724 P.2d 84 (Colo. App. 1986)—6:13
- Francis ex rel. Goodridge v. Dahl, 107 P.3d 1171 (Colo. App. 2005)—5:2, 6:9, 9:25
- Frankfort Oil Co. v. Abrams, 159 Colo. 535, 413 P.2d 190 (1966)—18:4

## TABLE OF CASES

- Franklin Drilling and Blasting Inc. v. Lawrence Construction Company, 2018 COA 59, 463 P.3d 883 (Colo. App. 2018)—32:4
- Fraser, Town of v. Davis, 644 P.2d 100 (Colo. App. 1982)—30:23
- Fravert v. Fesler, 11 Colo. App. 387, 53 P. 288 (1898)—30:25
- Frazier v. Kysor Indus. Corp., 43 Colo. App. 287, 607 P.2d 1296 (App. 1979)—14:1, 14:4
- Fredrickson v. Denver Public School Dist. No. 1, 819 P.2d 1068, 71 Ed. Law Rep. 274 (Colo. App. 1991)—31:6
- Freedman v. Kaiser Foundation Health Plan of Colorado, 849 P.2d 811 (Colo. App. 1992)—9:17
- Freyer v. Albin, 5 P.3d 329 (Colo. App. 1999)—7:4, 15:1
- Fried v. Leong, 946 P.2d 487 (Colo. App. 1997)—4:20, 6:8, 9:28
- Friedland v. Travelers Indem. Co., 105 P.3d 639 (Colo. 2005)—25:1
- Friedman & Son, Inc. v. Safeway Stores, Inc., 712 P.2d 1128 (Colo. App. 1985)—24:1
- Frisone v. Deane Automotive Center, Inc., 942 P.2d 1215 (Colo. App. 1996)—9:1, 30:9
- Frontier Exploration, Inc. v. American Nat. Fire Ins. Co., 849 P.2d 887 (Colo. App. 1992)—19:1, 19:2, 30:7
- Fry v. Lee, 2013 COA 100, 408 P.3d 843 (Colo. App. 2013)—22:1, 22:2, 22:8, 22:10, 22:11, 22:13
- Ft. Collins, City of v. Smith, 84 Colo. 511, 272 P. 6 (1928)—5:5
- F. W. Woolworth Co. v. Peet, 132 Colo. 11, 284 P.2d 659 (1955)—12:6

## G

- Galie v. RAM Associates Management Services, Inc., 757 P.2d 176 (Colo. App. 1988)—9:4, 30:7, 30:9
- Gallagher Transp. Co. v. Giggey, 101 Colo. 116, 71 P.2d 1039 (1937)—11:9
- Gallavan, In re Estate of, 89 P.3d 521 (Colo. App. 2004)—34:11
- Gallegos v. Graff, 32 Colo. App. 213, 508 P.2d 798, 12 U.C.C. Rep. Serv. 617 (App. 1973)—30:54
- Gallegos v. City of Monte Vista, 976 P.2d 299 (Colo. App. 1998)—8:22
- Galleria Towers, Inc. v. Crump Warren & Sommer, Inc., 831 P.2d 908 (Colo. App. 1991)—24:1
- Gamble v. Levitz Furniture Co. of the Midwest Inc., 759 P.2d 761 (Colo. App. 1988)—31:12
- Gambrell By and Through Eddy v. Ravin, 764 P.2d 362 (Colo. App. 1988)—9:12, 15:3
- G & A Land, LLC v. City of Brighton, 233 P.3d 701 (Colo. App. 2010)—30:7, 36:1
- Gant v. L.U. Transport, Inc., 331 Ill. App. 3d 924, 264 Ill. Dec. 459, 770 N.E.2d 1155 (1st Dist. 2002)—9:22
- Garcia v. Colorado Cab Company LLC, 2020 CO 55, 467 P.3d 302 (Colo. 2020)—9:32
- Garcia v. Colorado Cab Company LLC, 2019 COA 3, 2019 WL 150515 (Colo. App. 2019)—9:1
- Garcia v. Medved Chevrolet, Inc., 263 P.3d 92 (Colo. 2011)—29:1
- Garden of the Gods Village v. Hellman, 133 Colo. 286, 294 P.2d 597 (1956)—8:5, 8:18, 8:19, 8:20, 8:21, 9:7A

- Gardner v. City of Englewood, 131 Colo. 210, 282 P.2d 1084 (1955)—30:35
- Gardner v. Mid-Continent Coal & Coke Co., 149 Colo. 122, 368 P.2d 204 (1962)—30:28
- Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C., 168 P.3d 512 (Colo. App. 2007)—4:20, 15:14, 15:15, 15:16
- Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C., 95 P.3d 571 (Colo. 2004)—6:9, 15:10, 15:14, 15:15
- Garnet Ditch & Reservoir Co. v. Sampson, 48 Colo. 285, 110 P. 79 (1910)—9:7A
- Garrett v. Richardson, 149 Colo. 449, 369 P.2d 566 (1962)—30:56
- Garrison v. State of La., 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)—22:3
- Gasteazoro by and through Eder v. Catholic Health Initiatives Colorado, 2014 COA 134, 408 P.3d 874 (Colo. App. 2014)—15:4
- Gates Factory Store v. Coleman, 142 Colo. 246, 350 P.2d 559 (1960)—32:3
- Gates Iron Works v. Denver Engineering Works Co., 17 Colo. App. 15, 67 P. 173 (1901)—8:11
- Gattis, In re Estate of, 2013 COA 145, 318 P.3d 549 (Colo. App. 2013)—9:1, 19:1, 19:2, 19:5
- Gaulin v. Templin, 162 Colo. 55, 424 P.2d 377 (1967)—11:12
- Gavend v. Malman, 946 P.2d 558 (Colo. App. 1997)—15:18
- G.E.C. Minerals, Inc. v. Harrison Western Corp., 781 P.2d 115 (Colo. App. 1989)—9:22, 9:30, 12:16
- Geiger v. American Standard Ins. Co. of Wisconsin, 192 P.3d 480 (Colo. App. 2008)—25:3
- Geiger v. Kiser, 47 Colo. 297, 107 P. 267 (1910)—30:14
- General Acc. Fire & Life Assur. Corp. v. Mitchell, 128 Colo. 11, 259 P.2d 862 (1953)—30:25
- General Elec. Co. v. Niemet, 866 P.2d 1361 (Colo. 1994)—9:1
- General Steel Domestic Sales, LLC v. Bacheller, 2012 CO 68, 291 P.3d 1 (Colo. 2012)—5:4, 17:10
- General Steel Domestic Sales, LLC v. Hogan & Hartson, LLP, 230 P.3d 1275 (Colo. App. 2010)—15:18, 29:2, 29:4, 30:38, 30:39
- Genova v. Longs Peak Emergency Physicians, P.C., 72 P.3d 454 (Colo. App. 2003)—26:5, 31:15
- George v. Ute Water Conservancy Dist., 950 P.2d 1195 (Colo. App. 1997)—31:4
- Gerbaz v. Hulsey, 132 Colo. 359, 288 P.2d 357 (1955)—30:18
- Gerick v. Brock, 120 Colo. 394, 210 P.2d 214 (1949)—6:1
- Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913 (Colo. 1997)—9:1, 9:6, 9:14, 18:1
- Gertner v. Limon Nat. Bank, 82 Colo. 13, 257 P. 247 (1927)—30:7
- Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)—22:1, 22:3, 22:15, 22:27
- Gessler v. Grossman, 2015 COA 62, 2015 WL 2190666 (Colo. App. 2015)—26:2
- Gessler v. Smith, 2018 CO 48, 419 P.3d 964 (Colo. 2018)—26:2

# TABLE OF CASES

- Giampapa v. American Family Mut. Ins. Co., 64 P.3d 230 (Colo. 2003)—30:37, 30:39
- Giampapa v. American Family Mut. Ins. Co., 12 P.3d 839 (Colo. App. 2000)—6:7
- Giampapa v. American Family Mut. Ins. Co., 919 P.2d 838 (Colo. App. 1995)—25:6, 25:11
- Gibbons v. Ludlow, 2013 CO 49, 304 P.3d 239 (Colo. 2013)—9:18, 15:19, 15:25, 15:27
- Gibbons v. People, 2014 CO 67, 328 P.3d 95 (Colo. 2014)—4:3
- Gibbons & Reed Co. v. Howard, 129 Colo. 262, 269 P.2d 701 (1954)—8:22
- Gibson v. Dupree, 26 Colo. App. 324, 144 P. 1133 (1914)—8:13
- Giduck v. Niblett, 2014 COA 86, 408 P.3d 856 (Colo. App. 2014)—27:1
- Gifford v. City of Colorado Springs, 815 P.2d 1008 (Colo. App. 1991)—18:1, 36:3
- Gilbert v. Medical Economics Co., 665 F.2d 305 (10th Cir. 1981)—28:5
- Gilford v. People, 2 P.3d 120 (Colo. 2000)—35:2
- Gillett v. Young, 45 Colo. 562, 101 P. 766 (1909)—30:25
- Gilligan v. Blakesley, 93 Colo. 370, 26 P.2d 808 (1933)—12:10
- Giron v. Koktavay, 124 P.3d 821 (Colo. App. 2005)—15:1, 15:19, 15:21
- Gladin v. Von Engeln, 651 P.2d 905 (Colo. App. 1982)—18:4
- Gladin v. Von Engeln, 195 Colo. 88, 575 P.2d 418 (1978)—12:14
- Glasson v. Bowen, 84 Colo. 57, 267 P. 1066 (1928)—22:17
- Glendale, City of v. Rose, 679 P.2d 1096 (Colo. App. 1983)—36:2
- Glenn Arms Associates v. Century Mortg. & Inv. Corp., 680 P.2d 1315 (Colo. App. 1984)—32:1
- Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963)—19:9, 30:54
- Glover v. Innis, 252 P.3d 1204, 74 U.C.C. Rep. Serv. 2d 181 (Colo. App. 2011)—30:25, 30:27
- Glover v. Southard, 894 P.2d 21 (Colo. App. 1994)—9:1, 15:18
- Goettman v. North Fork Valley Restaurant, 176 P.3d 60 (Colo. 2007)—8:8, 8:22
- Goldblatt v. Chase, 121 Colo. 355, 216 P.2d 435 (1950)—20:10
- Golden, City of v. Parker, 138 P.3d 285 (Colo. 2006)—30:16
- Gold Rush Investments, Inc. v. G.E. Johnson Const. Co., Inc., 807 P.2d 1169 (Colo. App. 1990)—30:49
- Goldstein v. Denver Urban Renewal Authority, 192 Colo. 422, 560 P.2d 80 (1977)—36:1, 36:3, 36:8
- Gomba v. McLaughlin, 180 Colo. 232, 504 P.2d 337 (1972)—22:16, 22:26
- Gomez v. Black, 32 Colo. App. 332, 511 P.2d 531 (App. 1973)—6:1
- Gonzales v. Harris, 34 Colo. App. 282, 528 P.2d 259 (App. 1974)—21:7
- Gonzales v. People, 156 Colo. 252, 398 P.2d 236 (1965)—21:13
- Gonzales v. Safeway Stores, Inc., 147 Colo. 358, 363 P.2d 667 (1961)—14:12
- Gonzales v. Windlan, 2014 COA 176, 411 P.3d 878 (Colo. App. 2014)—3:12
- Gonzalez v. Yancey, 939 P.2d 525 (Colo. App. 1997)—9:1
- Good v. A. B. Chance Co., 39 Colo. App. 70, 565 P.2d 217 (App. 1977)—6:10, 14:25

- Goodboe v. Gabriella, 663 P.2d 1051 (Colo. App. 1983)—21:1
- Goodson v. American Standard Ins. Co. of Wisconsin, 89 P.3d 409 (Colo. 2004)—25:1, 25:2, 25:3, 25:8, 25:9
- Goodyear Tire & Rubber Co. v. Holmes, 193 P.3d 821 (Colo. 2008)—6:1, 6:11, 6:12, 30:49
- Gorab v. Equity General Agents, Inc., 661 P.2d 1196 (Colo. App. 1983)—23:2
- Gorab v. Zook, 943 P.2d 423 (Colo. 1997)—15:1, 15:2, 15:10, 15:11, 15:12, 15:13
- Gordon v. Benson, 925 P.2d 775 (Colo. 1996)—3:16, 9:22
- Gordon v. Boyles, 99 P.3d 75 (Colo. App. 2004)—22:1, 22:5, 23:2
- Gorsich v. Double B Trading Co., Inc., 893 P.2d 1357 (Colo. App. 1994)—8:1, 32:6
- Goss v. Clutch Exchange, Inc., 701 P.2d 33 (Colo. 1985)—19:4
- Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950)—9:18, 9:20
- Governor's Ranch Professional Center, Ltd. v. Mercy of Colorado, Inc., 793 P.2d 648 (Colo. App. 1990)—8:1
- Graber v. Westaway, 809 P.2d 1126 (Colo. App. 1991)—9:27
- Graham v. Shilling, 133 Colo. 5, 291 P.2d 396 (1955)—9:30, 16:2
- Graham Hydraulic Power, Inc. v. Stewart & Stevenson Power, Inc., 797 P.2d 835, 12 U.C.C. Rep. Serv. 2d 658 (Colo. App. 1990)—14:8, 14:16
- Granberry v. Perlmutter, 147 Colo. 474, 364 P.2d 211 (1961)—30:47
- Graphic Directions, Inc. v. Bush, 862 P.2d 1020 (Colo. App. 1993)—26:1, 26:5
- Graven v. Vail Associates, Inc., 909 P.2d 514 (Colo. 1995)—9:1
- Gray v. Blake, 131 Colo. 560, 283 P.2d 1078 (1955)—8:15
- Gray v. City of Manitou Springs, 43 Colo. App. 60, 598 P.2d 527 (App. 1979)—22:1
- Gray v. University of Colorado Hosp. Authority, 2012 COA 113, 284 P.3d 191 (Colo. App. 2012)—5:4
- Gray's Estate, Matter of, 37 Colo. App. 47, 541 P.2d 336 (App. 1975)—8:16
- Grease Monkey Intern., Inc. v. Montoya, 904 P.2d 468 (Colo. 1995)—8:1, 8:12, 8:18, 8:19, 8:20, 8:21, 8:22
- Greathouse v. Jones, 167 Colo. 406, 447 P.2d 985 (1968)—19:11
- Greathouse v. Jones, 158 Colo. 516, 408 P.2d 439 (1965)—19:17
- Great Western Sugar Co. v. White, 47 Colo. 547, 108 P. 156 (1910)—30:31
- Green v. Qwest Services Corp., 155 P.3d 383 (Colo. App. 2006)—23:1
- Green v. Taney, 7 Colo. 278, 3 P. 423 (1884)—3:12
- Green, In re, 11 P.3d 1078 (Colo. 2000)—22:1
- Greenbelt Co-op. Pub. Ass'n v. Bresler, 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970)—22:1, 22:3
- Greenberg v. Perkins, 845 P.2d 530 (Colo. 1993)—9:1, 15:1, 15:2
- Greene v. Thomas, 662 P.2d 491 (Colo. App. 1982)—9:3, 15:1, 15:3
- Greenleaf, Inc. v. Manco Chemical Co., 30 Colo. App. 367, 492 P.2d 889 (App. 1971)—19:1
- Greenwood v. Kier, 125 Colo. 333, 243 P.2d 417 (1952)—11:16, 16:2

## TABLE OF CASES

- Griffin v. State Farm Fire & Cas. Co., 104 P.3d 283 (Colo. App. 2004)—30:3
- Grimes v. Barndollar, 58 Colo. 421, 148 P. 256 (1914)—30:7
- Grimes v. Greenblatt, 47 Colo. 495, 107 P. 1111 (1910)—21:3
- Grimm Const. Co., Inc. v. Denver Bd. of Water Com'rs, 835 P.2d 599 (Colo. App. 1992)—24:1, 30:25
- Grizzell v. Hartman Enterprises, Inc., 68 P.3d 551 (Colo. App. 2003)—9:14, 12:2, 12:3
- Grobman's Estate, Matter of, 635 P.2d 231 (Colo. App. 1981)—34:7
- Groh v. Westin Operator, LLC, 2013 COA 39, 352 P.3d 472 (Colo. App. 2013)—9:20
- Grooms v. Rice, 163 Colo. 234, 429 P.2d 298 (1967)—30:40
- Gross v. Knuth, 28 Colo. App. 188, 471 P.2d 648 (App. 1970)—5:2
- Grossman v. Sherman, 198 Colo. 359, 599 P.2d 909 (1979)—30:35
- Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987)—18:1
- Guarantee Trust Life Insurance Company v. Estate of Casper by and through Casper, 2018 CO 43, 418 P.3d 1163 (Colo. 2018)—5:4, 6:1, 25:2, 25:10
- Guaranty Nat. Ins. Co. v. Williams, 982 P.2d 306 (Colo. 1999)—25:2
- Guerrero v. Bailey, 658 P.2d 278 (Colo. App. 1982)—6:9
- Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981)—6:10
- Gundersons, Inc. v. Tull, 678 P.2d 1061 (Colo. App. 1983)—5:2, 30:45
- Gurley v. Tomkins, 17 Colo. 437, 30 P. 344 (1892)—17:2, 17:6

## H

- Haan v. Traylor, 79 P.3d 114 (Colo. App. 2003)—30:29
- Hadden v. Gateway West Pub. Co., 130 Colo. 73, 273 P.2d 733 (1954)—22:16
- Hadley v. Baxendale, (1854) 156 Eng. Rep. 145—30:39
- Hageman v. TSI, Inc., 786 P.2d 452 (Colo. App. 1989)—9:14
- Hale v. Morris, 725 P.2d 26 (Colo. App. 1986)—9:2
- Hall v. American Standard Ins. Co. of Wisconsin, 2012 COA 201, 292 P.3d 1196 (Colo. App. 2012)—25:4, 25:10, 32:6
- Hall v. Frankel, 190 P.3d 852 (Colo. App. 2008)—15:1, 15:2, 15:3, 15:5, 15:10
- Hall v. McBryde By and Through McBryde, 919 P.2d 910 (Colo. App. 1996)—9:1, 20:5, 20:7, 20:8
- Hall v. Walter, 969 P.2d 224 (Colo. 1998)—5:4, 29:1, 29:2, 29:4
- Hallam v. City of Colorado Springs, 914 P.2d 479 (Colo. App. 1995)—12:15
- Halliburton v. Public Service Co. of Colorado, 804 P.2d 213 (Colo. App. 1990)—14:19
- Halsted v. Peterson, 797 P.2d 801 (Colo. App. 1990)—11:15, 11:17
- Halter v. Waco Scaffolding & Equipment Co., 797 P.2d 790 (Colo. App. 1990)—9:1, 14:1
- Halverson v. Pikes Peak Family Counseling and Mental Health Center, Inc., 851 P.2d 233 (Colo. App. 1992)—15:1
- Halverson v. Pikes Peak Family Counseling and Mental Health Center, Inc., 795 P.2d 1352 (Colo. App. 1990)—15:1

- Hamill v. Cheley Colorado Camps, Inc., 262 P.3d 945 (Colo. App. 2011)—9:1
- Hamilton v. Gravinsky, 28 Colo. App. 408, 474 P.2d 185 (App. 1970)—9:14
- Hamilton v. Hardy, 37 Colo. App. 375, 549 P.2d 1099 (App. 1976)—14:4, 14:26
- Hamilton v. Smith, 163 Colo. 88, 428 P.2d 706 (1967)—9:17
- Hammond v. Caton, 121 Colo. 7, 212 P.2d 845 (1949)—30:31
- Hamon Contractors, Inc. v. Carter & Burgess, Inc., 229 P.3d 282 (Colo. App. 2009)—9:1, 19:1, 19:2
- H & H Distributors, Inc. v. BBC Intern., Inc., 812 P.2d 659 (Colo. App. 1990)—19:5, 19:12
- H. & W. Paving Co. v. Asphalt Paving Co., 147 Colo. 506, 364 P.2d 185 (1961)—30:8
- Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256 (1946)—30:22
- Hanley v. Spencer, 108 Colo. 184, 115 P.2d 399 (1941)—15:6, 15:24, 15:30
- Hanover School Dist. No. 28 v. Barbour, 171 P.3d 223, 227 Ed. Law Rep. 274 (Colo. 2007)—31:8
- Hansen v. American Family Mutual Insurance Company, 2013 COA 173, 383 P.3d 28 (Colo. App. 2013)—25:4, 25:10
- Hansen v. Barron's Oilfield Service, Inc., 2018 COA 132, 429 P.3d 101 (Colo. App. 2018)—10:3
- Hansen v. Dillon, 156 Colo. 396, 400 P.2d 201 (1965)—11:2
- Hansen v. Hansen, 43 Colo. App. 525, 608 P.2d 364 (App. 1979)—23:1, 23:2
- Hansen v. State Farm Mut. Auto. Ins. Co., 936 P.2d 584 (Colo. App. 1996)—25:2
- Hanson v. Chamberlin, 76 Colo. 562, 233 P. 830 (1925)—19:5
- Han Ye Lee v. Colorado Times, Inc., 222 P.3d 957 (Colo. App. 2009)—22:1, 22:26, 23:1, 23:2, 23:6
- Harless v. Geyer, 849 P.2d 904 (Colo. App. 1992)—9:14
- Harman v. Chase, 160 Colo. 449, 417 P.2d 784 (1966)—6:2, 10:4
- Harmon v. Fred S. James & Co. of Colorado, Inc., 899 P.2d 258 (Colo. App. 1994)—25:2
- Harper v. People, 817 P.2d 77 (Colo. 1991)—1:6
- Harper ex rel. Al-Hamim, Estate of v. Denver Health and Hosp. Authority, 140 P.3d 273 (Colo. App. 2006)—15:1
- Harrington, Matter of Estate of, 850 P.2d 158 (Colo. App. 1993)—34:7
- Harris v. The Ark, 810 P.2d 226 (Colo. 1991)—9:6
- Harris v. McReynolds, 10 Colo. App. 532, 51 P. 1016 (1898)—21:3, 21:17
- Harris Group, Inc. v. Robinson, 209 P.3d 1188 (Colo. App. 2009)—24:1, 24:3, 24:5, 24:6
- Harrison v. Albright, 40 Colo. App. 227, 577 P.2d 302 (App. 1977)—30:27
- Harrison v. Smith, 821 P.2d 832 (Colo. App. 1991)—9:4, 19:1, 19:17
- Harsh v. Cure Feeders, L.L.C., 116 P.3d 1286 (Colo. App. 2005)—18:4
- Hart v. Colorado Real Estate Com'n, 702 P.2d 763 (Colo. App. 1985)—8:1, 26:2

## TABLE OF CASES

- Hart v. Herzig, 131 Colo. 458, 283 P.2d 177 (1955)—21:12
- Hart v. Zaitz, 72 Colo. 315, 211 P. 391 (1922)—19:17
- Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989)—22:3
- Hartford Fire Ins. Co. v. Kolar, 30 Colo. App. 1, 488 P.2d 1114 (App. 1971)—17:1, 17:9
- Hartford Fire Ins. Co. v. Public Service Co. of Colorado, 676 P.2d 25 (Colo. App. 1983)—9:7, 9:17
- Hartman v. Community Responsibility Center, Inc., 87 P.3d 202 (Colo. App. 2003)—15:18, 15:25
- Harvey v. Denver & R.G.R. Co., 44 Colo. 258, 99 P. 31 (1908)—30:7
- Harvey v. Farmers Ins. Exchange, 983 P.2d 34 (Colo. App. 1998)—25:11
- Harwig v. Downey, 56 P.3d 1220 (Colo. App. 2002)—30:9
- Hasegawa v. Day, 684 P.2d 936 (Colo. App. 1983)—9:1, 11:15, 11:17
- Haselden-Langley Constructors, Inc. v. D.E. Farr & Associates, Inc., 676 P.2d 709 (Colo. App. 1983)—30:7
- Haurin's Estate, Matter of, 43 Colo. App. 296, 605 P.2d 65 (App. 1979)—34:8
- Hauser v. Rose Health Care Systems, 857 P.2d 524 (Colo. App. 1993)—8:14, 8:15, 30:1, 30:7
- Havens v. Hardesty, 43 Colo. App. 162, 600 P.2d 116 (App. 1979)—21:2
- Hawley v. Mowatt, 160 P.3d 421 (Colo. App. 2007)—18:4
- Hayden v. Perry, 110 Colo. 347, 134 P.2d 212 (1943)—19:10
- Hayes v. North Table Mountain Corp., 43 Colo. App. 467, 608 P.2d 830 (App. 1979)—30:56
- Hayes v. Smith, 832 P.2d 1022, 76 Ed. Law Rep. 234 (Colo. App. 1991)—22:1, 22:2, 22:8
- Hayko v. Colorado & Utah Coal Co., 77 Colo. 143, 235 P. 373, 39 A.L.R. 482 (1925)—12:4
- Hayutin v. De Andrea, 139 Colo. 40, 337 P.2d 383 (1959)—30:56
- H.B. v. Lake County Dist. Court, 819 P.2d 499 (Colo. 1991)—41:1
- H. B. Bolas Enterprises, Inc. v. Zarlengo, 156 Colo. 530, 400 P.2d 447 (1965)—30:54
- Heald v. Crump, 73 Colo. 251, 215 P. 140 (1923)—30:20
- HealthONE v. Rodriguez ex rel. Rodriguez, 50 P.3d 879 (Colo. 2002)—4:20, 9:1, 15:1, 15:14, 15:15
- Hecla Min. Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991)—25:1
- Hedgecock v. Stewart Title Guar. Co., 676 P.2d 1208 (Colo. App. 1983)—5:2
- Heil v. Zink, 120 Colo. 481, 210 P.2d 610 (1949)—20:10
- Hein Enterprises, Ltd. v. San Francisco Real Estate Investors, 720 P.2d 975 (Colo. App. 1985)—24:1, 24:7
- Helgoth v. Foxhoven, 125 Colo. 446, 244 P.2d 886 (1952)—9:30
- Henderson v. Master Klean Janitorial, Inc., 70 P.3d 612 (Colo. App. 2003)—12:1, 12:2, 12:3
- Hendricks By and Through Martens v. Weld County School Dist. No. 6, 895 P.2d 1120, 100 Ed. Law Rep. 1159 (Colo. App. 1995)—12:15
- Henisse v. First Transit, Inc., 247 P.3d 577 (Colo. 2011)—12:15

- Hensley v. Sherman Car Wash Equipment Co., 33 Colo. App. 279, 520 P.2d 146, 14 U.C.C. Rep. Serv. 940 (App. 1974)—14:25
- Hensley v. Tri-QSI Denver Corp., 98 P.3d 965 (Colo. App. 2004)—5:4
- Herbert v. Lando, 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115, 3 Fed. R. Evid. Serv. 822, 27 Fed. R. Serv. 2d 1 (1979)—22:3
- Herbertson v. Cohen, 132 Colo. 231, 287 P.2d 47 (1955)—32:1
- Herbertson v. Russell, 150 Colo. 110, 371 P.2d 422 (1962)—10:3, 10:4
- Herefort v. Cramer, 7 Colo. 483, 4 P. 896 (1884)—19:10, 19:17
- Heritage Village Owners Ass'n, Inc. v. Golden Heritage Investors, Ltd., 89 P.3d 513 (Colo. App. 2004)—18:4, 29:6
- Hernandez v. City and County of Denver, 2018 COA 151, 439 P.3d 57 (Colo. App. 2018)—5:4
- Hernandez v. Downing, 154 P.3d 1068 (Colo. 2007)—10:3
- Herod v. Colorado Farm Bureau Mut. Ins. Co., 928 P.2d 834 (Colo. App. 1996)—25:2, 25:9
- Herrera v. City and County of Denver, 221 P.3d 423 (Colo. App. 2009)—12:15
- Herrera v. Gene's Towing, 827 P.2d 619 (Colo. App. 1992)—6:1
- Herrera v. Lerma, 2018 COA 141, 440 P.3d 1194 (Colo. App. 2018)—6:8, 6:9
- Herrera v. San Luis Central Railroad Co., 997 P.2d 1238 (Colo. App. 1999)—31:5, 31:12, 31:13
- Herring v. Platte River Power Authority, 728 P.2d 709 (Colo. 1986)—36:4
- Hersh Companies Inc. v. Highline Village Associates, 30 P.3d 221 (Colo. 2001)—30:26
- Hertz Driv-Ur-Self System of Colorado v. Hendrickson, 109 Colo. 1, 121 P.2d 483 (1942)—9:14
- Hewitt v. Pitkin County Bank and Trust Co., 931 P.2d 456 (Colo. App. 1995)—23:1
- Hewitt v. Rice, 154 P.3d 408 (Colo. 2007)—17:1, 17:10, 17:11
- Heyn, In re Estate of, 47 P.3d 724 (Colo. App. 2002)—26:1
- Hice v. Lott, 223 P.3d 139 (Colo. App. 2009)—9:1, 15:21, 15:26
- Hickman v. Catholic Health Initiatives, 2013 COA 129, 328 P.3d 266 (Colo. App. 2013)—15:1
- Higbie v. Johnson, 626 P.2d 1147 (Colo. App. 1980)—30:43
- Higgs v. District Court In and For Douglas County, 713 P.2d 840 (Colo. 1985)—17:1
- High Country Movin', Inc. v. U.S. West Direct Co., 839 P.2d 469 (Colo. App. 1992)—9:4
- Highfill v. Ermence, 73 Colo. 478, 216 P. 533 (1923)—19:15
- Highlands Ranch University Park, LLC v. Uno of Highlands Ranch, Inc., 129 P.3d 1020 (Colo. App. 2005)—30:13
- Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983, 18 U.C.C. Rep. Serv. 901 (1975)—14:1, 14:4, 14:16, 14:22, 14:25
- Hiigel v. General Motors Corp., Chevrolet Motor Division, 34 Colo. App. 145, 525 P.2d 1198, 14 U.C.C. Rep. Serv. 1247 (App. 1974)—14:3
- Hilberg By and Through Hilberg v. F.W. Woolworth Co., 761 P.2d 236 (Colo. App. 1988)—9:1, 9:14, 14:3

## TABLE OF CASES

- Hildebrand v. New Vista Homes II, LLC, 252 P.3d 1159 (Colo. App. 2010)—6:12, 8:5, 8:22, 9:1, 9:4, 29:4, 30:31
- Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (App. 1974)—5:2, 6:1, 6:8, 6:10
- Hill v. Boatright, 890 P.2d 180 (Colo. App. 1994)—15:18
- Hilliard v. Shellabarger, 120 Colo. 441, 210 P.2d 441 (1949)—34:18
- Hilzer v. MacDonald, 169 Colo. 230, 454 P.2d 928 (1969)—9:17
- Hines v. Denver and Rio Grande Western R. Co., 829 P.2d 419 (Colo. App. 1991)—9:1
- Hinkle v. Basic Chemical Corp., 163 Colo. 408, 431 P.2d 14 (1967)—30:28
- H.M.O. Systems, Inc. v. Choicecare Health Services, Inc., 665 P.2d 635, 35 U.C.C. Rep. Serv. 1254 (Colo. App. 1983)—30:39, 30:40
- Hoang v. Arbess, 80 P.3d 863 (Colo. App. 2003)—8:22, 9:1, 29:1
- Hodges v. Ladd, 143 Colo. 143, 352 P.2d 660 (1960)—9:30
- Hoehne Ditch Co. v. John Flood Ditch Co., 76 Colo. 500, 233 P. 167 (1925)—5:2, 30:41
- Hoery v. U.S., 64 P.3d 214 (Colo. 2003)—18:1, 18:2
- Hoff v. Amalgamated Transit Union, Div. 662, 758 P.2d 674 (Colo. App. 1987)—31:5
- Hoff v. Armbruster, 122 Colo. 563, 226 P.2d 312 (1950)—34:2, 34:6, 34:8, 34:9
- Hoffler v. Colorado Dept. of Corrections, 27 P.3d 371 (Colo. 2001)—22:17
- Hoffman v. Schafer, 815 P.2d 971 (Colo. App. 1991)—6:1
- Hoffsetz v. Jefferson County School Dist. No. R-1, 757 P.2d 155, 47 Ed. Law Rep. 1196 (Colo. App. 1988)—23:1
- Hogue v. Colorado & S. Ry. Co., 110 Colo. 552, 136 P.2d 276 (1943)—9:6
- Holcomb v. Steven D. Smith, Inc., 170 P.3d 815 (Colo. App. 2007)—29:5
- Holland v. Board of County Com'rs of County of Douglas, 883 P.2d 500 (Colo. App. 1994)—30:36, 31:4, 31:5
- Holland Furnace Co. v. Robson, 157 Colo. 347, 402 P.2d 628 (1965)—19:16
- Holley v. Huang, 284 P.3d 81 (Colo. App. 2011)—15:10
- Holmes v. Gamble, 655 P.2d 405 (Colo. 1982)—9:17, 9:22
- Holmes v. Young, 885 P.2d 305 (Colo. App. 1994)—15:18, 26:1
- Holter v. Moore and Co., 681 P.2d 962 (Colo. App. 1983)—30:56
- Home Public Market v. Newrock, 111 Colo. 428, 142 P.2d 272 (1943)—9:17
- Hook v. Lakeside Park Co., 142 Colo. 277, 351 P.2d 261, 86 A.L.R.2d 339 (1960)—9:18
- Hoover v. Jordan, 27 Colo. App. 515, 150 P. 333 (1915)—22:18
- Hoover v. Shott, 68 Colo. 385, 189 P. 848 (1920)—18:4
- Hopp & Flesch, LLC v. Backstreet, 123 P.3d 1176 (Colo. 2005)—15:18
- Horace Mann Ins. Co. v. Peters, 948 P.2d 80, 122 Ed. Law Rep. 813 (Colo. App. 1997)—25:1
- Horrell v. City of Aurora, 976 P.2d 315 (Colo. App. 1998)—12:15
- Horton-Cavey Realty Co. v. Reese, 34 Colo. App. 323, 527 P.2d 914 (App. 1974)—30:56

- Horton v. Mondragon, 705 P.2d 977 (Colo. App. 1984)—9:13, 11:1
- Horton v. Reeves, 186 Colo. 149, 526 P.2d 304 (1974)—20:1, 20:5, 20:7
- Hott v. Tillotson-Lewis Const. Co., 682 P.2d 1220 (Colo. App. 1983)—8:3, 30:49
- Hottel v. Poudre Valley Reservoir Co., 41 Colo. 370, 92 P. 918 (1907)—30:47
- Houy v. Davis Oil Co., 175 Colo. 180, 486 P.2d 18 (1971)—30:46
- Hover v. Clamp, 40 Colo. App. 410, 579 P.2d 1181 (App. 1978)—11:18
- Howard v. Avon Products, Inc., 155 Colo. 444, 395 P.2d 1007 (1964)—14:17, 14:19
- Howard v. Hester, 139 Colo. 255, 338 P.2d 106 (1959)—26:2
- Howard Through Young v. City and County of Denver, 837 P.2d 255 (Colo. App. 1992)—12:15
- Hoyal v. Pioneer Sand Co., Inc., 188 P.3d 716 (Colo. 2008)—6:10, 10:3, 10:4
- Hoyt v. Target Stores, Div. of Dayton Hudson Corp., 981 P.2d 188 (Colo. App. 1998)—31:1, 31:12
- Huddleston by Huddleston v. Union Rural Elec. Ass'n, 841 P.2d 282 (Colo. 1992)—8:5, 8:18, 8:19, 8:20, 8:21, 9:7, 9:24, 9:28, 9:29
- Hudson v. American Founders Life Ins. Co. of Denver, 151 Colo. 54, 377 P.2d 391 (1962)—30:28
- Huffman v. Westmoreland Coal Co., 205 P.3d 501 (Colo. App. 2009)—32:4
- Hughes v. Mountain States Tel. and Tel. Co., 686 P.2d 814 (Colo. App. 1984)—31:5
- Huginin v. McCunniff, 2 Colo. 367, 1874 WL 192 (1874)—18:1
- Hunt v. Cates, 61 Colo. 365, 157 P. 1162 (1916)—30:10, 30:11
- Hunter v. Mansell, 240 P.3d 469 (Colo. App. 2010)—18:4
- Hunter v. Quaintance, 69 Colo. 28, 168 P. 918 (1917)—6:13
- Huntoon v. TCI Cablevision of Colorado, Inc., 969 P.2d 681 (Colo. 1998)—3:15, 9:22, 11:12
- Huntoon v. TCI Cablevision of Colorado, Inc., 948 P.2d 33 (Colo. App. 1997)—3:16
- Husband v. Colorado Mountain Cellars, Inc., 867 P.2d 57 (Colo. App. 1993)—30:38
- Hushaw v. Dunn, 62 Colo. 109, 160 P. 1037 (1916)—21:18
- Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988)—23:1
- Huston v. Ohio & Colorado Smelting & Refining Co., 63 Colo. 152, 165 P. 251 (1917)—19:1
- Hutchins v. Haffner, 63 Colo. 365, 167 P. 966 (1917)—11:15, 11:17
- Hutchins v. La Plata Mountain Resources, Incorporated, 2016 CO 45, 373 P.3d 582 (Colo. 2016)—30:26
- Hutchinson v. Proxmire, 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979)—22:1
- Hutton v. Memorial Hosp., 824 P.2d 61 (Colo. App. 1991)—23:1
- Hyden v. Farmers Ins. Exchange, 20 P.3d 1222 (Colo. App. 2000)—25:2
- Hylton v. Wade, 29 Colo. App. 98, 478 P.2d 690 (App. 1970)—6:8
- Hynes v. Donaldson, 155 Colo. 456, 395 P.2d 221 (1964)—8:8, 8:13, 8:22

## TABLE OF CASES

### I

- Iacino v. Brown, 121 Colo. 450, 217 P.2d 266 (1950)—11:12
- Ice v. Benedict Nuclear Pharmaceuticals, Inc., 797 P.2d 757 (Colo. App. 1990)—30:18
- Illinois v. Wardlow, 528 U.S. 119, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)—21:11
- I.M.A., Inc. v. Rocky Mountain Airways, Inc., 713 P.2d 882 (Colo. 1986)—30:10, 30:12
- Imperial Distribution Services, Inc. v. Forrest, 741 P.2d 1251 (Colo. 1987)—9:7
- Independence Coffee & Spice Co. v. Kalkman, 61 Colo. 98, 156 P. 135 (1916)—3:8
- Independence Indem. Co. v. International Trust Co., 96 Colo. 92, 39 P.2d 780 (1934)—8:9, 8:10, 8:11
- Independent Lumber Co. v. Leatherwood, 102 Colo. 460, 79 P.2d 1052 (1938)—9:1
- Industrial Products Intern., Inc. v. Emo Trans, Inc., 962 P.2d 983 (Colo. App. 1997)—30:1, 30:3
- Inland/Riggle Oil Co. v. Painter, 925 P.2d 1083 (Colo. 1996)—9:28
- Inter-State Detective Bureau, Inc. v. Denver Post, Inc., 29 Colo. App. 313, 484 P.2d 131 (App. 1971)—22:1, 22:2, 22:14
- Interbank Investments, LLC v. Eagle River Water and Sanitation Dist., 77 P.3d 814 (Colo. App. 2003)—30:10
- Interbank Investments, L.L.C. v. Vail Valley Consolidated Water Dist., 12 P.3d 1224 (Colo. App. 2000)—30:12, 30:13, 30:41
- Intermill v. Heumesser, 154 Colo. 496, 391 P.2d 684 (1964)—5:2, 6:8
- Intermountain Lumber Co. v. Radetsky, 75 Colo. 570, 227 P. 564, 33 A.L.R. 844 (1924)—19:17
- International Harvester Co. v. Sharoff, 202 F.2d 52 (10th Cir. 1953)—14:18
- International Harvester Co. of America v. Lawrence Inv. Co., 95 Colo. 523, 37 P.2d 529 (1934)—32:2
- International Paper Co. v. Cohen, 126 P.3d 222 (Colo. App. 2005)—30:7
- International State Bank of Trinidad v. Trinidad Bean & Elevator Co., 79 Colo. 286, 245 P. 489 (1926)—5:7
- International Technical Instruments, Inc. v. Engineering Measurements Co., 678 P.2d 558, 38 U.C.C. Rep. Serv. 868 (Colo. App. 1983)—14:8, 30:39
- Ireland v. Jacobs, 114 Colo. 168, 163 P.2d 203, 161 A.L.R. 1413 (1945)—30:7
- Irwin v. Robinson, 143 Colo. 336, 355 P.2d 108 (1960)—34:20
- Isbill Associates, Inc. v. City and County of Denver, 666 P.2d 1117 (Colo. App. 1983)—6:11
- Itin v. Ungar, 17 P.3d 129 (Colo. 2000)—32:1, 32:4
- Iverson v. Solsbery, 641 P.2d 314 (Colo. App. 1982)—9:14, 19:1

### J

- Jackson v. American Family Mut. Ins. Co., 258 P.3d 328 (Colo. App. 2011)—30:26

- Jackson v. Harsco Corp., 673 P.2d 363, 59 A.L.R.4th 61 (Colo. 1983)—14:25, 14:27
- Jackson v. Kiel, 13 Colo. 378, 22 P. 504 (1889)—6:13
- Jackson v. Moore, 883 P.2d 622 (Colo. App. 1994)—5:3
- Jackson Enterprises, Inc. v. Maguire, 144 Colo. 164, 355 P.2d 540 (1960)—3:2
- Jacobs v. Commonwealth Highland Theatres, Inc., 738 P.2d 6 (Colo. App. 1986)—5:4, 9:30
- Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957)—8:4, 8:6, 8:7
- Jacque By and Through Dyer v. Public Service Co. of Colorado, 890 P.2d 138 (Colo. App. 1994)—9:1, 9:14
- Jaffe v. City and County of Denver, 15 P.3d 806 (Colo. App. 2000)—12:15
- Jagow v. E-470 Public Highway Authority, 49 P.3d 1151 (Colo. 2002)—36:2, 36:4
- James H. Moore & Associates Realty, Inc. v. Arrowhead at Vail, 892 P.2d 367 (Colo. App. 1994)—30:8, 30:25
- Jardel Enterprises, Inc. v. Triconsultants, Inc., 770 P.2d 1301 (Colo. App. 1988)—30:9
- Jarnagin v. Busby, Inc., 867 P.2d 63 (Colo. App. 1993)—26:2, 26:3, 26:4, 34:18
- Jasken v. Sheehy Const. Co., 642 P.2d 58 (Colo. App. 1982)—30:45
- Jasper v. Bicknell, 62 Colo. 318, 162 P. 144 (1916)—19:10
- J.A.V., In re, 206 P.3d 467 (Colo. App. 2009)—41:6
- Jaynes v. Centura Health Corp., 148 P.3d 241 (Colo. App. 2006)—31:4, 31:5, 31:12
- J.C. v. Dungarvin Colorado, LLC, 252 P.3d 41 (Colo. App. 2010)—9:1
- Jefferson County School Dist. No. R-1 v. Shorey, 826 P.2d 830, 73 Ed. Law Rep. 526 (Colo. 1992)—30:9
- Jefferson County School Dist. R-1 v. Justus By and Through Justus, 725 P.2d 767, 34 Ed. Law Rep. 1235 (Colo. 1986)—9:1
- Jehly v. Brown, 2014 COA 39, 327 P.3d 351 (Colo. App. 2014)—8:15, 19:2
- Jenks v. Sullivan, 826 P.2d 825 (Colo. 1992)—12:15
- Jet Courier Service, Inc. v. Mulei, 771 P.2d 486 (Colo. 1989)—26:1, 27:1, 27:2, 31:7
- Jilot v. State, 944 P.2d 566 (Colo. App. 1996)—12:15
- Jimerson v. First American Title Ins. Co., 989 P.2d 258 (Colo. App. 1999)—9:4
- Jiminez v. Industrial Claim Appeals Office of State of Colo., 107 P.3d 965 (Colo. App. 2003)—25:2
- J.L., People ex rel., 121 P.3d 315 (Colo. App. 2005)—41:1
- Jobe v. Writer Corp., 34 Colo. App. 240, 526 P.2d 151 (App. 1974)—30:40
- Joe Dickerson & Associates, LLC v. Dittmar, 34 P.3d 995 (Colo. 2001)—28:1, 28:4, 28:11
- Johns v. Tesley, 126 Colo. 331, 250 P.2d 194 (1952)—3:4
- Johnson v. Benson, 725 P.2d 21 (Colo. App. 1986)—30:13
- Johnson v. Graham, 679 P.2d 1090 (Colo. App. 1983)—19:2, 19:5, 19:11, 30:54

## TABLE OF CASES

- Johnson v. Lambotte, 147 Colo. 203, 363 P.2d 165 (1961)—11:6  
 Johnson v. People, 2019 CO 17, 436 P.3d 529 (Colo. 2019)—3:3  
 Johnson v. Regional Transp. Dist., 916 P.2d 619 (Colo. App. 1995)—12:15  
 Johnston Realty v. Bender, 39 P.3d 1215 (Colo. App. 2001)—8:1  
 Johnston v. Amsted Industries, Inc., 830 P.2d 1141 (Colo. App. 1992)—14:1  
 Johnston v. CIGNA Corp., 916 P.2d 643 (Colo. App. 1996)—26:2  
 Johnston v. Deidesheimer, 76 Colo. 559, 232 P. 1113 (1925)—17:9  
 Jones v. Adkins, 34 Colo. App. 196, 526 P.2d 153 (App. 1974)—30:24  
 Jones v. Caterpillar Tractor Co., 701 P.2d 84 (Colo. App. 1984)—9:20  
 Jones v. Cruzan, 33 P.3d 1262 (Colo. App. 2001)—5:4, 6:1  
 Jones v. Franklin, 139 Colo. 384, 340 P.2d 123 (1959)—20:4  
 Jordan v. City of Aurora, 876 P.2d 38 (Colo. App. 1993)—25:2  
 Jordan v. Bogner, 844 P.2d 664 (Colo. 1993)—15:2, 15:3  
 Jordan v. Panorama Orthopedics & Spine Center, PC, 2015 CO 24, 346 P.3d 1035 (Colo. 2015)—12:1, 12:2, 12:3, 12:10, 12:11, 12:12  
 J.P.L., People ex rel., 214 P.3d 1072 (Colo. App. 2009)—40:1  
 J. S. Dillon & Sons Stores Co. v. Carrington, 169 Colo. 242, 455 P.2d 201 (1969)—21:7  
 Jules v. Embassy Properties, Inc., 905 P.2d 13 (Colo. App. 1995)—12:2, 12:3  
 Julius Hyman & Co. v. Velsicol Corp., 123 Colo. 563, 233 P.2d 977 (1951)—27:2  
 Justice v. Stanley Aviation Corp., 35 Colo. App. 1, 530 P.2d 984 (App. 1974)—31:2, 31:5  
 Just In Case Business Lighthouse, LLC v. Murray, 2013 COA 112M, 383 P.3d 1 (Colo. App. 2013)—9:24, 9:28, 9:29, 19:1, 19:2  
 JW Const. Co., Inc. v. Elliott, 253 P.3d 1265 (Colo. App. 2011)—8:22

## K

- Kading v. Kading, 683 P.2d 373 (Colo. App. 1984)—4:2, 4:4  
 Kahland v. Villarreal, 155 P.3d 491 (Colo. App. 2006)—9:1  
 Kaiser v. Market Square Discount Liquors, Inc., 992 P.2d 636 (Colo. App. 1999)—30:10, 30:12, 30:15, 30:38  
 Kaiser Foundation Health Plan of Colorado v. Sharp, 741 P.2d 714 (Colo. 1987)—3:1, 9:18, 9:20, 15:1  
 Kaitz v. District Court, Second Judicial Dist., 650 P.2d 553 (Colo. 1982)—5:4, 26:1, 26:5  
 Kaufman v. People, 202 P.3d 542 (Colo. 2009)—20:13  
 Kauntz v. HCA-Healthone, LLC, 174 P.3d 813 (Colo. App. 2007)—15:1  
 Kaupp v. Texas, 538 U.S. 626, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003)—21:6  
 Kayser v. Mongham, 8 Colo. 232, 6 P. 803 (1885)—7:3  
 Kearl v. Portage Environmental, Inc., 205 P.3d 496 (Colo. App. 2008)—31:12, 31:13  
 Kedar v. Public Service Co. of Colorado, 709 P.2d 15 (Colo. App. 1985)—9:7  
 Keelan v. Van Waters & Rogers, Inc., 820 P.2d 1145 (Colo. App. 1991)—6:1

- Keith v. Valdez, 934 P.2d 897 (Colo. App. 1997)—9:1
- Keller v. A.O. Smith Harvestore Products, Inc., 819 P.2d 69, 15 U.C.C. Rep. Serv. 2d 733 (Colo. 1991)—9:4, 14:16
- Keller v. Koca, 111 P.3d 445 (Colo. 2005)—9:1, 9:21
- Kellogg v. Pizza Oven, Inc., 157 Colo. 295, 402 P.2d 633 (1965)—15:25, 15:26
- Kelton v. Ramsey, 961 P.2d 569 (Colo. App. 1998)—15:21
- Kendall v. Hargrave, 142 Colo. 120, 349 P.2d 993 (1960)—6:1
- Kendall v. Lively, 94 Colo. 483, 31 P.2d 343 (1934)—22:1, 22:25
- Kendrick v. Pippin, 252 P.3d 1052 (Colo. 2011)—1:5, 9:12, 9:17
- Kennedy-Fudge v. Fink, 644 P.2d 91 (Colo. App. 1982)—11:9
- Kennedy v. King Soopers Inc., 148 P.3d 385 (Colo. App. 2006)—25:10
- Keohane v. Stewart, 882 P.2d 1293, 54 A.L.R.5th 835 (Colo. 1994)—22:1, 22:9, 22:11, 22:12, 22:21, 22:25
- Kepley v. Kim, 843 P.2d 133 (Colo. App. 1992)—9:14, 11:2
- Kerby v. Flamingo Club, Inc., 35 Colo. App. 127, 532 P.2d 975 (App. 1974)—9:20
- Kerin v. Board of Educ., Lamar School Dist. No. RE-2, Prowers County, 860 P.2d 574, 86 Ed. Law Rep. 458 (Colo. App. 1993)—31:6
- Kern v. General Motors Corp., 724 P.2d 1365 (Colo. App. 1986)—14:3, 14:7
- Kerr v. Australia Pacific Resources, Ltd., 841 P.2d 401 (Colo. App. 1992)—30:56
- Keser v. Chagnon, 159 Colo. 209, 410 P.2d 637 (1966)—30:21
- Kettelhut v. Edwards, 65 Colo. 506, 177 P. 961 (1919)—21:2
- Kidwell v. K-Mart Corp., 942 P.2d 1280 (Colo. App. 1996)—9:24, 9:28, 9:29, 12:2, 12:3
- Kiefer Concrete, Inc. v. Hoffman, 193 Colo. 15, 562 P.2d 745 (1977)—8:6, 8:7
- Kiely v. St. Germain, 670 P.2d 764, 37 U.C.C. Rep. Serv. 878 (Colo. 1983)—30:7
- Kildahl v. Tagge, 942 P.2d 1283 (Colo. App. 1996)—6:7, 9:22, 15:6
- Kimelman v. City of Colorado Springs, 775 P.2d 51 (Colo. App. 1988)—9:2
- Kinard v. Coats Co., Inc., 37 Colo. App. 555, 553 P.2d 835 (App. 1976)—14:25
- King Soopers, Inc. v. Mitchell, 140 Colo. 119, 342 P.2d 1006 (1959)—9:6, 12:6
- Kinsey v. Preeson, 746 P.2d 542, 79 A.L.R.4th 213 (Colo. 1987)—19:1, 19:12
- Kirk v. Denver Pub. Co., 818 P.2d 262 (Colo. 1991)—5:4
- Kirk v. Himes, 170 Colo. 378, 461 P.2d 444 (1969)—9:14
- Kirkland v. Allen, 678 P.2d 568 (Colo. App. 1984)—30:40
- Kirkpatrick v. McCarty, 112 Colo. 588, 152 P.2d 994 (1944)—8:13
- Kisselman v. American Family Mut. Ins. Co., 292 P.3d 964 (Colo. App. 2011)—25:1, 25:4, 25:7, 25:8, 25:10
- Kistler v. Northern Colo. Water Conservancy Dist., 126 Colo. 11, 246 P.2d 616 (1952)—36:3, 36:8
- Kittinger v. City of Colorado Springs, 872 P.2d 1265 (Colo. App. 1993)—12:15

## TABLE OF CASES

- Kitto v. Gilbert, 39 Colo. App. 374, 570 P.2d 544 (App. 1977)—6:1, 9:12, 9:17
- Klancke v. Smith, 829 P.2d 464 (Colo. App. 1991)—15:18
- Klimkiewicz v. Karnick, 150 Colo. 267, 372 P.2d 736 (1962)—15:2
- Klinger v. Adams County School Dist. No. 50, 130 P.3d 1027, 207 Ed. Law Rep. 419 (Colo. 2006)—30:40
- Klipfel v. Neill, 30 Colo. App. 428, 494 P.2d 115, 10 U.C.C. Rep. Serv. 582 (App. 1972)—14:14
- Klun v. Klun, 2019 CO 46, 442 P.3d 88 (Colo. 2019)—30:31
- Knapp v. Hurd, 100 Colo. 537, 68 P.2d 557 (1937)—32:1
- Knapp v. Post Printing & Pub. Co., 111 Colo. 492, 144 P.2d 981 (1943)—22:1, 22:2, 22:8, 22:14
- KN Energy, Inc. v. Great Western Sugar Co., 698 P.2d 769 (Colo. 1985)—30:34
- Kniffin v. Colorado Western Development Co., 622 P.2d 586 (Colo. App. 1980)—30:49
- Knight v. Cantrell, 154 Colo. 396, 390 P.2d 948 (1964)—19:1, 19:15
- Knowlton v. Cervi, 142 Colo. 394, 350 P.2d 1066 (1960)—22:8
- Koch v. Wright, 67 Colo. 292, 184 P. 363 (1919)—17:5
- Koehn v. R.D. Werner Co., Inc., 809 P.2d 1045 (Colo. App. 1990)—14:1, 14:27
- Koenig v. PurCo Fleet Services, Inc., 2012 CO 56, 285 P.3d 979 (Colo. 2012)—6:13, 30:52
- Kogul v. Sonheim, 150 Colo. 316, 372 P.2d 731 (1962)—10:4
- Koinis v. Colorado Dept. of Public Safety, 97 P.3d 193 (Colo. App. 2003)—31:9
- Konas v. Red Owl Stores, Inc., 158 Colo. 29, 404 P.2d 546 (1965)—17:2
- Koon v. Barmettler, 134 Colo. 221, 301 P.2d 713 (1956)—30:26
- Koontz v. Rosener, 787 P.2d 192 (Colo. App. 1989)—8:4, 26:1, 26:5
- Kopeikin v. Merchants Mortg. and Trust Corp., 679 P.2d 599 (Colo. 1984)—19:2, 19:9
- Krane v. Saint Anthony Hosp. Systems, 738 P.2d 75 (Colo. App. 1987)—15:1, 15:10
- Kranz v. Rubush, 120 Colo. 264, 209 P.2d 555 (1949)—32:2
- Krause v. Watson Bros. Transp. Co., 119 Colo. 73, 200 P.2d 387 (1948)—9:9
- Krauss v. Catholic Health Initiatives Mountain Region, 66 P.3d 195 (Colo. App. 2003)—31:9, 31:12
- Kroesen v. Shenandoah Homeowners Association, Inc., 2020 COA 31, 461 P.3d 672 (Colo. App. 2020)—30:42
- Kronmeyer, Estate of v. Meinig, 948 P.2d 119 (Colo. App. 1997)—10:3
- Kroulik v. Knuppel, 634 P.2d 1027 (Colo. App. 1981)—18:4
- Krueger v. Ary, 205 P.3d 1150 (Colo. 2009)—3:5, 3:8, 9:17, 11:12, 14:21, 16:6, 34:16, 34:17
- Kruse v. McKenna, 178 P.3d 1198 (Colo. 2008)—29:1
- Krystkowiak v. W.O. Brisben Companies, Inc., 90 P.3d 859 (Colo. 2004)—24:1
- Kuehn v. Kuehn, 642 P.2d 524 (Colo. App. 1981)—8:12
- Kuhn v. Tribune-Republican Pub. Co., 637 P.2d 315 (Colo. 1981)—22:3

- Kulik v. Public Service Co. of Colorado, 43 Colo. App. 139, 605 P.2d 475 (App. 1979)—9:7
- Kunz v. Warren, 725 P.2d 794 (Colo. App. 1986)—19:14, 26:1
- Kuta v. Joint Dist. No. 50(J) of Counties of Delta, Gunnison, Mesa and Montrose, 799 P.2d 379, 63 Ed. Law Rep. 1092 (Colo. 1990)—30:3, 30:35, 31:4
- Kyle W. Larson Enterprises, Inc. v. Allstate Ins. Co., 2012 COA 160M, 305 P.3d 409 (Colo. App. 2012)—25:4
- Kysor Indus. Corp. v. Frazier, 642 P.2d 908, 22 A.L.R.4th 195 (Colo. 1982)—14:7, 14:27

L

- Lafarge North America, Inc. v. K.E.C.I. Colorado, Inc., 250 P.3d 682 (Colo. App. 2010)—25:1
- Lafitte v. State Highway Dept., 885 P.2d 338 (Colo. App. 1994)—12:15
- LaFond v. Sweeney, 2012 COA 27, 345 P.3d 932 (Colo. App. 2012)—26:2
- La Garde v. Aeverman, 144 Colo. 465, 356 P.2d 971 (1960)—9:14, 9:15
- Lahay v. City Nat. Bank of Denver, 15 Colo. 339, 25 P. 704 (1891)—19:1
- Lahey v. Benjou, 759 P.2d 855 (Colo. App. 1988)—9:1
- Lake Durango Water Co., Inc. v. Public Utilities Com'n of State of Colorado, 67 P.3d 12 (Colo. 2003)—30:13
- Lakeside Park Co. v. Wein, 111 Colo. 322, 141 P.2d 171 (1943)—9:9
- Lakeview Associates, Ltd. v. Maes, 907 P.2d 580 (Colo. 1995)—12:2, 12:3
- Lamborn v. Kirkpatrick, 97 Colo. 421, 50 P.2d 542 (1935)—34:15
- Lambotte v. Payton, 147 Colo. 207, 363 P.2d 167 (1961)—9:14
- Lambrecht v. Archibald, 119 Colo. 356, 203 P.2d 897 (1949)—11:8
- Lampe v. Presbyterian Medical Center, 41 Colo. App. 465, 590 P.2d 513 (App. 1978)—31:5, 31:12
- Lanahan v. Chi Psi Fraternity, 175 P.3d 97 (Colo. 2008)—10:3
- Land-Wells v. Rain Way Sprinkler and Landscape, LLC, 187 P.3d 1152 (Colo. App. 2008)—12:1, 12:2, 12:3
- Land v. Hill, 644 P.2d 43 (Colo. App. 1981)—17:1, 21:18
- Landis v. McGowan, 114 Colo. 355, 165 P.2d 180 (1946)—8:6, 8:7
- Landmark Towers Association, Inc. v. UMB Bank, N.A., 2016 COA 61, 436 P.3d 1126 (Colo. App. 2016)—30:1
- L & M Enterprises, Inc. v. City of Golden, 852 P.2d 1337 (Colo. App. 1993)—24:1, 30:7
- Landsberg v. Hutsell, 837 P.2d 205 (Colo. App. 1992)—6:10
- Lane v. Arkansas Valley Pub. Co., 675 P.2d 747 (Colo. App. 1983)—22:3
- Lannon v. Taco Bell, Inc., 708 P.2d 1370 (Colo. App. 1985)—1:11, 9:6
- La Plant v. Hyman, 66 Colo. 128, 180 P. 83 (1919)—22:18
- La Plata Elec. Ass'n, Inc. v. Cummins, 728 P.2d 696 (Colo. 1986)—36:4, 36:5
- La Plata Medical Center Associates, Ltd. v. United Bank of Durango, 857 P.2d 410 (Colo. 1993)—19:2, 19:17
- Largo Corp. v. Crespin, 727 P.2d 1098 (Colo. 1986)—9:14, 9:20, 9:21
- Larimer v. Salida Granite Corp., 112 Colo. 598, 153 P.2d 998 (1944)—30:14

## TABLE OF CASES

- Larrieu v. Best Buy Stores, L.P., 2013 CO 38, 303 P.3d 558 (Colo. 2013)—12:1, 12:2, 12:3  
 Larson v. Clark Equipment Co., 33 Colo. App. 277, 518 P.2d 308, 14 U.C.C. Rep. Serv. 49 (App. 1974)—14:1  
 Larson v. Lindahl, 167 Colo. 409, 450 P.2d 77 (1968)—15:2  
 Larson v. Long, 74 Colo. 152, 219 P. 1066 (1923)—9:15, 11:10  
 Lascano v. Vowell, 940 P.2d 977 (Colo. App. 1996)—5:2, 6:8, 6:9  
 Lasnetske v. Parres, 148 Colo. 71, 365 P.2d 250 (1961)—11:18  
 Lathrop v. Entenmann's, Inc., 770 P.2d 1367 (Colo. App. 1989)—31:12, 31:13, 31:14  
 Lauck v. E-470 Public Highway Authority, 187 P.3d 1148 (Colo. App. 2008)—12:15  
 Laughman v. Girtakovskis, 2015 COA 143, 374 P.3d 504 (Colo. App. 2015)—9:1, 9:6, 9:7  
 Laura A. Newman, LLC v. Roberts, 2016 CO 9, 365 P.3d 972 (Colo. 2016)—1:2  
 Lauren Corp. v. Century Geophysical Corp., 953 P.2d 200 (Colo. App. 1998)—17:10  
 Lauric v. USAA Cas. Ins. Co., 209 P.3d 190 (Colo. App. 2009)—25:2  
 Lavato v. People, 159 Colo. 223, 411 P.2d 328 (1966)—21:13  
 Lawrence v. Buena Vista Sanitation Dist., 989 P.2d 254 (Colo. App. 1999)—12:15  
 Lawrence v. Taylor, 8 P.3d 607 (Colo. App. 2000)—5:2, 9:6  
 Lawry v. Palm, 192 P.3d 550 (Colo. App. 2008)—30:39  
 Lawson v. Safeway, Inc., 878 P.2d 127 (Colo. App. 1994)—6:1, 6:8, 12:3  
 Lawson v. Sigfrid, 83 Colo. 116, 262 P. 1018 (1927)—15:20  
 Lawson v. Stow, 2014 COA 26, 327 P.3d 340 (Colo. App. 2014)—9:14, 22:1  
 Lazar v. Riggs, 79 P.3d 105 (Colo. 2003)—25:8  
 LB Rose Ranch, LLC v. Hansen Construction, Inc., 2019 COA 141, 477 P.3d 739 (Colo. App. 2019)—9:27  
 Leake v. Cain, 720 P.2d 152 (Colo. 1986)—9:1, 9:14  
 Lebsock's Estate, Matter of, 44 Colo. App. 220, 618 P.2d 683 (App. 1980)—19:10  
 LeCoq v. Klemme, 28 Colo. App. 590, 476 P.2d 280 (App. 1970)—9:9  
 Lee v. Colorado Dept. of Health, 718 P.2d 221 (Colo. 1986)—6:5  
 Lee v. Degler, 169 Colo. 226, 454 P.2d 937 (1969)—11:15, 11:16  
 Lee v. Durango Music, 144 Colo. 270, 355 P.2d 1083 (1960)—30:39  
 Lee v. Great Empire Broadcasting, Inc., 794 P.2d 1032 (Colo. App. 1989)—30:2, 31:2, 31:5, 31:7  
 Leece v. Griffin, 150 Colo. 132, 371 P.2d 264 (1962)—19:13  
 Lego v. Schmidt, 805 P.2d 1119 (Colo. App. 1990)—9:1, 9:14  
 Legro v. Robinson, 2015 COA 183, 369 P.3d 785 (Colo. App. 2015)—12:2, 13:1, 13:3  
 Legro v. Robinson, 2012 COA 182, 328 P.3d 238 (Colo. App. 2012)—13:1, 13:3, 13:5  
 Lehman v. Lindenmeyer, 48 Colo. 305, 109 P. 956 (1909)—34:15  
 LeHouillier v. Gallegos, 2019 CO 8, 434 P.3d 156 (Colo. 2019)—9:18, 15:20

- Lehrer v. Lorenzen, 124 Colo. 17, 233 P.2d 382 (1951)—10:4  
 Leonard v. Hallett, 57 Colo. 274, 141 P. 481 (1914)—30:7  
 Leppke v. Segura, 632 P.2d 1057 (Colo. App. 1981)—9:1, 9:10  
 Leprino v. Nationwide Property and Cas. Ins. Co., 89 P.3d 487 (Colo. App. 2003)—25:1  
 Lesser v. Porter, 94 Colo. 348, 30 P.2d 318 (1934)—19:15  
 Lester v. Marshall, 143 Colo. 189, 352 P.2d 786 (1960)—12:12  
 Lestoque v. M. R. Mansfield Realty, Inc., 36 Colo. App. 32, 536 P.2d 1146 (App. 1975)—26:5  
 Letts v. Iwig, 153 Colo. 20, 384 P.2d 726 (1963)—3:4  
 Levy v. American Family Mut. Ins. Co., 293 P.3d 40 (Colo. App. 2011)—6:1  
 Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964)—9:32  
 Lewis v. Carsh, 79 Colo. 51, 244 P. 598 (1926)—19:16  
 Lewis v. Emil Clayton Plumbing Co., 25 P.3d 1254 (Colo. App. 2000)—9:1  
 Lewis v. Great Western Distributing Co. of Borger, 168 Colo. 424, 451 P.2d 754 (1969)—6:10  
 Lewis v. Lewis, 189 P.3d 1134 (Colo. 2008)—26:4  
 Lewis v. McGraw-Hill Broadcasting Co., Inc., 832 P.2d 1118 (Colo. App. 1992)—22:1, 22:3, 28:5  
 Lewis v. Winslow, 77 Colo. 95, 234 P. 1070 (1925)—19:15  
 Lexton-Ancira Real Estate Fund, 1972 v. Heller, 826 P.2d 819 (Colo. 1992)—5:4, 29:1, 29:5, 29:6  
 L.G. v. People, 890 P.2d 647 (Colo. 1995)—41:1, 41:3  
 Liber v. Flor, 160 Colo. 7, 415 P.2d 332, 35 A.L.R.3d 1165 (1966)—9:7A  
 Liebelt v. Bob Penkhus Volvo-Mazda, Inc., 961 P.2d 1147 (Colo. App. 1998)—9:1, 9:14  
 Lieff v. Medco Professional Services Corp., 973 P.2d 1276 (Colo. App. 1998)—30:56  
 Life Care Centers of America, Inc. v. East Hampden Associates Ltd. Partnership, 903 P.2d 1180 (Colo. App. 1995)—26:5  
 Lighthall v. Moore, 2 Colo. App. 554, 31 P. 511 (1892)—30:19  
 Lin v. City of Golden, 97 P.3d 303 (Colo. App. 2004)—12:15  
 Lincoln v. Denver Post, 31 Colo. App. 283, 501 P.2d 152 (App. 1972)—28:8  
 Lind v. O'Reilly, 636 P.2d 1319 (Colo. App. 1981)—22:1, 22:2, 22:14  
 Lindemuth v. Jefferson County School Dist. R-1, 765 P.2d 1057, 50 Ed. Law Rep. 1245 (Colo. App. 1988)—22:16, 23:2, 28:5  
 Ling v. Whittemore, 140 Colo. 247, 343 P.2d 1048 (1959)—22:18  
 Lininger v. Knight, 123 Colo. 213, 226 P.2d 809 (1951)—22:1, 22:2, 22:8, 22:17, 22:23  
 Lininger By and Through Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988)—15:1  
 Lininger Implement Co. v. Queen City Foundry Co., 73 Colo. 412, 216 P. 527 (1923)—32:2  
 Lira v. Davis, 832 P.2d 240 (Colo. 1992)—5:4, 9:22  
 Littlejohn v. Stanley Structures, Inc., 688 P.2d 1130 (Colo. App. 1984)—14:1, 14:3, 14:25

## TABLE OF CASES

- Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co., 11 Colo. 223, 17 P. 760 (1888)—18:4
- Little Thompson Water Ass'n v. Strawn, 171 Colo. 295, 466 P.2d 915 (1970)—30:12, 30:46
- Littleton, City of v. Employers Fire Ins. Co., 169 Colo. 104, 453 P.2d 810 (1969)—30:23
- Littleton, City of v. Industrial Claim Appeals Office, 2016 CO 25, 370 P.3d 157 (Colo. 2016)—3:1, 3:6
- Livingston v. Utah-Colorado Land & Live Stock Co., 106 Colo. 278, 103 P.2d 684 (1940)—18:4
- L.J. v. Carricato, 2018 COA 3, 413 P.3d 1280 (Colo. App. 2018)—9:14
- L.L. v. People, 10 P.3d 1271 (Colo. 2000)—41:1
- Locke v. Van Wyke, 91 Colo. 14, 11 P.2d 563 (1932)—15:4
- Lockett v. Garrett, 1 P.3d 206 (Colo. App. 1999)—22:3
- Lockwood Grader Corp. v. Bockhaus, 129 Colo. 339, 270 P.2d 193 (1954)—27:1
- Logixx Automation, Inc. v. Lawrence Michels Family Trust, 56 P.3d 1224 (Colo. App. 2002)—30:39
- Loloff v. Sterling, 31 Colo. 102, 71 P. 1113 (1903)—36:8
- Lombard v. Colorado Outdoor Educ. Center, Inc., 266 P.3d 412 (Colo. App. 2011)—7:7, 9:6, 12:3, 12:18
- Lombard v. Colorado Outdoor Educ. Center, Inc., 187 P.3d 565 (Colo. 2008)—9:1, 9:14, 12:1, 12:2, 12:18
- Lombard v. Colorado Outdoor Educ. Center, Inc., 179 P.3d 16, 230 Ed. Law Rep. 745 (Colo. App. 2007)—12:3
- Long v. Cordain, 2014 COA 177, 343 P.3d 1061 (Colo. App. 2014)—30:10
- Long v. Wright, 70 Colo. 173, 197 P. 1016 (1921)—30:13
- Longbottom v. State Bd. of Community Colleges and Occupational Educ., 872 P.2d 1253, 90 Ed. Law Rep. 1237 (Colo. App. 1993)—12:15
- Longmont, City of v. Henry-Hobbs, 50 P.3d 906 (Colo. 2002)—12:15
- Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Associates, 867 P.2d 70 (Colo. App. 1993)—30:25
- Lopez v. City of Grand Junction, 2018 COA 97, 2018 WL 3384674 (Colo. App. 2018)—8:18, 12:15
- Lopez v. Trujillo, 2016 COA 53, 399 P.3d 750 (Colo. App. 2016)—9:1
- Lorenzen v. Pinnacol Assurance, 2019 COA 54, 457 P.3d 100 (Colo. App. 2019)—9:18, 15:1
- Louder v. Jacobs, 119 Colo. 511, 205 P.2d 236 (1949)—17:1, 17:4
- Loup-Miller v. Brauer & Associates-Rocky Mountain, Inc., 40 Colo. App. 67, 572 P.2d 845 (App. 1977)—9:6, 9:31
- Lovejoy v. Denver & R.G.R. Co., 59 Colo. 222, 146 P. 263 (1915)—8:22
- Loveland Essential Group, LLC v. Grommon Farms, Inc., 251 P.3d 1109 (Colo. App. 2010)—30:53
- Loveland ex rel. Loveland v. St. Vrain Valley School Dist. RE-1J, 2012 COA 112, 328 P.3d 228, 306 Ed. Law Rep. 528 (Colo. App. 2012)—9:1
- Lowell v. Hessey, 46 Colo. 517, 105 P. 870 (1909)—8:16
- Loza v. State Farm Mut. Auto. Ins. Co., 970 P.2d 478 (Colo. App. 1997)—6:7

Luby v. Jefferson County Bank of Lakewood, 28 Colo. App. 441, 476 P.2d 292 (App. 1970)—30:7  
 Lucas v. Abbott, 198 Colo. 477, 601 P.2d 1376 (1979)—26:2  
 L.U. Cattle Co. v. Wilson, 714 P.2d 1344 (Colo. App. 1986)—30:39  
 Lucero v. Ulvestad, 2015 COA 98, 411 P.3d 949 (Colo. App. 2015)—12:1, 12:2, 12:3  
 Lucht's Concrete Pumping, Inc. v. Horner, 255 P.3d 1058 (Colo. 2011)—30:7, 31:4, 31:5  
 Lucht's Concrete Pumping, Inc. v. Horner, 224 P.3d 355 (Colo. App. 2009)—26:1  
 Ludlow v. Gibbons, 310 P.3d 130 (Colo. App. 2011)—26:2  
 Luenberger v. City of Golden, 990 P.2d 1145 (Colo. App. 1999)—12:15  
 Lui v. Barnhart, 987 P.2d 942 (Colo. App. 1999)—9:14, 9:17, 13:1  
 Lujan v. Life Care Centers of America, 222 P.3d 970 (Colo. App. 2009)—8:9  
 Lunt v. Post Printing & Publishing Co., 48 Colo. 316, 110 P. 203 (1910)—9:1  
 Lurvey v. Phil Long Ford, Inc., 37 Colo. App. 11, 541 P.2d 114 (App. 1975)—19:1  
 Luster v. Brinkman, 205 P.3d 410 (Colo. App. 2008)—4:3  
 Lutfi v. Brighton Community Hosp. Ass'n, 40 P.3d 51 (Colo. App. 2001)—15:1, 24:1, 30:7, 30:16  
 Luttgren v. Fischer, 107 P.3d 1152 (Colo. App. 2005)—15:18, 15:19  
 Lutz v. Becker, 89 Colo. 360, 2 P.2d 1081 (1931)—32:2  
 Lyons v. City of Aurora, 987 P.2d 900 (Colo. App. 1999)—12:15  
 Lyons v. Nasby, 770 P.2d 1250 (Colo. 1989)—9:6, 9:14, 9:18, 9:21, 9:22  
 Lyons, Town of v. Watt, 43 Colo. 238, 95 P. 949 (1908)—9:21  
 Lytle v. Kite, 728 P.2d 305 (Colo. 1986)—8:8

## M

Mabry v. Tom Stanger & Co., 33 P.3d 1206 (Colo. App. 2001)—30:56  
 MacFarlane, People ex rel. v. Alpert Corp., 660 P.2d 1295 (Colo. App. 1982)—29:1  
 Mack v. Board of County Com'rs of Adams County, 152 Colo. 300, 381 P.2d 987 (1963)—36:4  
 Mack v. McKanna, 687 P.2d 1326 (Colo. App. 1984)—30:56  
 Mackall v. JPMorgan Chase Bank, N.A., 2014 COA 120, 356 P.3d 946 (Colo. App. 2014)—17:10  
 Mackey v. Briggs, 16 Colo. 143, 26 P. 131 (1891)—8:3  
 MacLarty v. Whiteford, 30 Colo. App. 378, 496 P.2d 1071 (App. 1972)—22:18  
 Maercklein v. Smith, 129 Colo. 72, 266 P.2d 1095 (1954)—9:6, 15:7, 15:8, 15:10  
 Magin v. DVCO Fuel Systems, Inc., 981 P.2d 673 (Colo. App. 1999)—27:1  
 Magliocco v. Olson, 762 P.2d 681 (Colo. App. 1987)—18:1, 30:25  
 Magnetic Copy Services, Inc. v. Seismic Specialists, Inc., 805 P.2d 1161 (Colo. App. 1990)—30:23  
 Mahan v. Capitol Hill Internal Medicine P.C., 151 P.3d 685 (Colo. App. 2006)—30:16

## TABLE OF CASES

- Mahoney Marketing Corp. v. Sentry Builders of Colorado, Inc., 697 P.2d 1139 (Colo. App. 1985)—26:1, 26:5
- Maikka's Estate, In re, 110 Colo. 433, 134 P.2d 723 (1942)—34:7
- Main Elec., Ltd. v. Printz Services Corp., 980 P.2d 522 (Colo. 1999)—30:15, 30:31
- Majors v. J. C. Penney Co., Inc., 31 Colo. App. 568, 506 P.2d 399 (App. 1972)—9:17
- Mallett v. Pirkey, 171 Colo. 271, 466 P.2d 466 (1970)—15:10
- Mallon Oil Co. v. Bowen/Edwards Associates, Inc., 965 P.2d 105 (Colo. 1998)—18:1, 19:2, 19:5
- Management Recruiters of Boulder, Inc. v. Miller, 762 P.2d 763 (Colo. App. 1988)—30:40
- Manion v. Stephens, 128 Colo. 253, 261 P.2d 1021 (1953)—22:23
- Manitou & P.P. Ry. Co. v. Harris, 45 Colo. 185, 101 P. 61 (1909)—18:4
- Mannhard v. Clear Creek Skiing Corp., 682 P.2d 64 (Colo. App. 1983)—9:7
- Manuel v. Fort Collins Newspapers, Inc., 661 P.2d 289 (Colo. App. 1982)—22:3
- Manzi by Manzi v. Montgomery Elevator Co., 865 P.2d 902 (Colo. App. 1993)—9:17
- Mapes v. City Council of City of Walsenburg, 151 P.3d 574 (Colo. App. 2006)—30:56
- Marcello v. Exempla, Inc., 2012 COA 200, 317 P.3d 1275 (Colo. App. 2012)—9:1
- Marez v. Dairyland Ins. Co., 638 P.2d 286, 32 A.L.R.4th 130 (Colo. 1981)—25:1
- Margenau v. Bowlin, 12 P.3d 1214 (Colo. App. 2000)—5:6
- Mari v. Wagner Equipment Co., Inc., 721 P.2d 1208, 42 U.C.C. Rep. Serv. 1634 (Colo. App. 1986)—32:1
- Mariani v. Rocky Mountain Hosp. and Medical Service, 902 P.2d 429 (Colo. App. 1994)—31:4, 31:5
- MarkWest Energy Partners, L.P. v. Zurich American Insurance Company, 2016 COA 110, 411 P.3d 1080 (Colo. App. 2016)—25:1
- Marlow v. Atchison, Topeka & Santa Fe Ry. Co., 671 P.2d 438 (Colo. App. 1983)—6:10
- Marquardt v. Perry, 200 P.3d 1126 (Colo. App. 2008)—30:7
- Marron v. Helmecke, 100 Colo. 364, 67 P.2d 1034 (1937)—8:13, 8:22
- Marso v. Homeowners Realty, Inc., 2018 COA 15M, 418 P.3d 542 (Colo. App. 2018)—6:1, 8:22
- Martin v. Bralliar, 36 Colo. App. 254, 540 P.2d 1118 (App. 1975)—15:10
- Martin v. Minnard, 862 P.2d 1014 (Colo. App. 1993)—9:14, 9:17, 11:1, 11:8
- Martin v. Montezuma-Cortez School Dist. RE-1, 841 P.2d 237, 79 Ed. Law Rep. 256 (Colo. 1992)—24:6
- Martin v. People, 2014 CO 68, 329 P.3d 247 (Colo. 2014)—4:3
- Martin v. Principal Cas. Ins. Co., 835 P.2d 505 (Colo. App. 1991)—25:2
- Martin v. Weld County, 43 Colo. App. 49, 598 P.2d 532 (App. 1979)—5:4, 15:1, 22:27, 28:15
- Martinez v. Affordable Housing Network, Inc., 123 P.3d 1201 (Colo. 2005)—3:7

- Martinez v. Affordable Housing Network, Inc., 109 P.3d 983 (Colo. App. 2004)—29:6, 30:18
- Martinez v. Atlas Bolt & Screw Co., 636 P.2d 1287 (Colo. App. 1981)—14:4
- Martinez v. Badis, 842 P.2d 245 (Colo. 1992)—15:1, 15:21, 15:26
- Martinez v. Continental Enterprises, 697 P.2d 789 (Colo. App. 1984)—17:10
- Martinez v. CSG Redevelopment Partners LLLP, 2019 COA 91, 469 P.3d 491 (Colo. App. 2019)—12:15
- Martinez v. City of Lakewood, 655 P.2d 1388 (Colo. App. 1982)—12:15
- Martinez v. Lewis, 969 P.2d 213 (Colo. 1998)—9:1, 15:2, 29:4
- Martinez v. Shapland, 833 P.2d 837 (Colo. App. 1992)—6:1
- Martinez v. Weld County School Dist. RE-1, 60 P.3d 736, 172 Ed. Law Rep. 1001 (Colo. App. 2002)—12:15
- Martinez v. W.R. Grace Co., 782 P.2d 827 (Colo. App. 1989)—9:13, 12:17
- Martin Marietta Corp. v. Lorenz, 823 P.2d 100 (Colo. 1992)—31:12, 31:13
- Maryland Cas. Co. v. Messina, 874 P.2d 1058 (Colo. 1994)—32:1, 32:2
- Mason v. Adams, 961 P.2d 540 (Colo. App. 1997)—12:15
- Mason v. Farm Credit of Southern Colorado, ACA, 2018 CO 46, 419 P.3d 975 (Colo. 2018)—32:1, 32:3
- Masser v. Foxworthy, 86 Colo. 313, 281 P. 360 (1929)—19:10
- Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991)—22:1, 22:13
- Masters v. Castrodale, 121 P.3d 362 (Colo. App. 2005)—17:1
- Masterson v. McCroskie, 194 Colo. 460, 573 P.2d 547 (1978)—32:3
- Mathews v. Lomas & Nettleton Co., 754 P.2d 791 (Colo. App. 1988)—9:2
- Matson v. White, 122 Colo. 79, 220 P.2d 864 (1950)—30:17
- Matt Skorey Packard Co. v. Canino, 142 Colo. 411, 350 P.2d 1069 (1960)—9:6, 9:22
- Maxwell v. United Services Automobile Association, 2014 COA 2, 342 P.3d 474 (Colo. App. 2014)—19:2, 19:9
- May v. Petersen, 2020 COA 75, 465 P.3d 589, 378 Ed. Law Rep. 534 (Colo. App. 2020)—9:22, 11:4
- May, Matter of, 756 P.2d 362 (Colo. 1988)—30:1
- May Dept. Stores Co. v. University Hills, Inc., 789 P.2d 434 (Colo. App. 1989)—9:1
- Mayer v. Sampson, 157 Colo. 278, 402 P.2d 185 (1965)—7:5, 16:1
- Mazurek v. Nielsen, 42 Colo. App. 386, 599 P.2d 269 (App. 1979)—30:54, 30:55
- McAlonan v. U.S. Home Corp., 724 P.2d 78 (Colo. App. 1986)—6:12
- McCafferty v. Musat, 817 P.2d 1039 (Colo. App. 1990)—15:18, 15:19, 15:21
- McCall v. District Court In and For Montezuma County, 651 P.2d 392 (Colo. 1982)—41:1
- McCall v. Meyers, 94 P.3d 1271 (Colo. App. 2004)—9:22
- McCall v. Roper, 32 Colo. App. 352, 511 P.2d 541 (App. 1973)—11:15
- McCammon & Associates, Inc. v. McGraw-Hill Broadcasting Co., Inc., 716 P.2d 490 (Colo. App. 1986)—22:1

## TABLE OF CASES

- McCartney v. Foster, 150 Colo. 537, 374 P.2d 704 (1962)—32:2  
 McCarty v. Kaiser-Hill Co., L.L.C., 15 P.3d 1122 (Colo. App. 2000)—  
 15:1, 23:1  
 McClair v. Wilson, 18 Colo. 82, 31 P. 502 (1892)—30:20  
 McClintic v. Hesse, 151 P.3d 611 (Colo. App. 2006)—11:12  
 McCormick v. First Nat. Bank, 88 Colo. 599, 299 P. 7 (1931)—32:1  
 McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body, 799 P.2d 394 (Colo.  
 App. 1989)—24:6  
 McCrone's Estate, In re, 106 Colo. 69, 101 P.2d 25 (1940)—34:12  
 McCullough v. Thompson, 133 Colo. 352, 295 P.2d 221 (1956)—30:56  
 McDonald v. Lakewood Country Club, 170 Colo. 355, 461 P.2d 437  
 (1969)—8:22, 17:1, 21:2, 22:17  
 McDonald v. Smith, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384, 17  
 Fed. R. Evid. Serv. 1041 (1985)—22:1  
 McDonald v. Zions First National Bank, N.A., 2015 COA 29, 348 P.3d  
 957 (Colo. App. 2015)—30:10, 30:12, 30:16  
 McDonald's Corp. v. Brentwood Center, Ltd., 942 P.2d 1308 (Colo. App.  
 1997)—30:39, 30:41  
 McEntyre v. Jones, 128 Colo. 461, 263 P.2d 313 (1953)—10:4  
 McGill v. General Motors Corp., 174 Colo. 388, 484 P.2d 790 (1971)—  
 10:3  
 McGill Corp. v. Werner, 631 P.2d 1178 (Colo. App. 1981)—30:56  
 McGillis Investment Company, LLP v. First Interstate Financial Utah  
 LLC, 2015 COA 116, 370 P.3d 295 (Colo. App. 2015)—3:5A  
 McGraw v. Kerr, 23 Colo. App. 163, 128 P. 870 (1912)—15:6, 15:24,  
 15:30  
 McHaffie By and Through McHaffie v. Bunch, 891 S.W.2d 822 (Mo.  
 1995)—9:1  
 McIntire v. Barnes, 4 Colo. 285, 1878 WL 270 (1878)—30:25, 30:50  
 McIntyre v. Jones, 194 P.3d 519 (Colo. App. 2008)—22:1, 22:4, 22:13,  
 22:18  
 McKelvy v. Liberty Mut. Ins. Co., 983 P.2d 42 (Colo. App. 1998)—23:1,  
 25:2  
 McKenna v. Oliver, 159 P.3d 697 (Colo. App. 2006)—28:1, 29:1  
 McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 115 S. Ct. 879,  
 130 L. Ed. 2d 852 (1995)—31:12, 31:16  
 McKinley v. City of Glenwood Springs, 2015 COA 126, 361 P.3d 1080  
 (Colo. App. 2015)—12:15  
 McKinley v. Willow Const. Co., Inc., 693 P.2d 1023 (Colo. App. 1984)—  
 30:49  
 McKinney v. Christmas, 143 Colo. 361, 353 P.2d 373 (1960)—26:2, 26:5  
 McLaughlin v. BNSF Ry. Co., 2012 COA 92, 300 P.3d 925 (Colo. App.  
 2012)—6:7, 6:8  
 McLaughlin v. Oxley, 2012 COA 114, 297 P.3d 1007 (Colo. App. 2012)—  
 9:1  
 McLister v. Epstein & Lawrence, P.C., 934 P.2d 844 (Colo. App. 1996)—  
 15:21, 15:22, 15:24, 15:26  
 McNeill v. Allen, 35 Colo. App. 317, 534 P.2d 813 (App. 1975)—5:4, 5:7,  
 7:4, 19:5, 19:17

- McShane v. Stirling Ranch Property Owners Association, Inc., 2017 CO 38, 393 P.3d 978 (Colo. 2017)—8:18
- McShane v. Stirling Ranch Property Owners Association, Inc., 2015 COA 48, 411 P.3d 145 (Colo. App. 2015)—9:1
- McWilliams v. Garstin, 70 Colo. 59, 197 P. 246 (1921)—3:15
- M.D.C./Wood, Inc. v. Mortimer, 866 P.2d 1380 (Colo. 1994)—9:5, 19:1, 19:8, 19:9, 19:10
- MDM Group Associates, Inc. v. CX Reinsurance Co. Ltd., 165 P.3d 882 (Colo. App. 2007)—24:1, 26:2
- Mead Associates, Inc. v. Antonsen, 677 P.2d 434 (Colo. App. 1984)—30:7
- Mead Associates, Inc. v. Scottsbluff Sash & Door Co., 856 P.2d 40 (Colo. App. 1993)—30:7
- Meardon v. Freedom Life Insurance Company of America, 2018 COA 32, 417 P.3d 929 (Colo. App. 2018)—25:4
- Medema Homes, Inc. v. Lynn, 647 P.2d 664 (Colo. 1982)—30:40, 30:42
- Medina v. State, 35 P.3d 443 (Colo. 2001)—12:15
- Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A., 892 P.2d 230 (Colo. 1995)—9:4, 15:18, 15:21
- Meiter v. Cavanaugh, 40 Colo. App. 454, 580 P.2d 399 (App. 1978)—23:2, 23:6
- Melcher v. Beeler, 48 Colo. 233, 110 P. 181 (1910)—22:18
- Melsheimer v. Sullivan, 1 Colo. App. 22, 27 P. 17 (1891)—13:1
- Melssen, 2012 COA 102—25:10
- Melssen v. Auto-Owners Ins. Co., 2012 COA 102, 285 P.3d 328—25:10
- Melssen v. Auto-Owners Insurance Co., 2012 COA 102, 285 P.3d 328—30:25
- Melton By and Through Melton v. Larrabee, 832 P.2d 1069 (Colo. App. 1992)—9:7
- Melville v. Southward, 791 P.2d 383 (Colo. 1990)—15:1, 15:2
- Memorial Gardens, Inc. v. Olympian Sales & Management Consultants, Inc., 690 P.2d 207 (Colo. 1984)—24:1, 24:3, 24:5, 24:6, 24:7
- Mendoza v. Pioneer General Insurance Company, 2014 COA 29, 365 P.3d 371 (Colo. App. 2014)—6:8, 6:9, 29:2
- Mentzel v. Judicial Dept. of State of Colo., 778 P.2d 323 (Colo. App. 1989)—12:15
- Mercantile Financial Corp. v. Hammit, 680 P.2d 239 (Colo. App. 1984)—32:3
- Meredith v. Ramsdell, 152 Colo. 548, 384 P.2d 941 (1963)—19:1, 19:3, 19:5, 19:6
- Merrick v. Burns, Wall, Smith & Mueller, P.C., 43 P.3d 712 (Colo. App. 2001)—15:18
- Mesa Sand and Gravel Co. v. Landfill, Inc., 759 P.2d 757 (Colo. App. 1988)—5:2, 30:38
- Messler v. Phillips, 867 P.2d 128 (Colo. App. 1993)—5:4, 9:4, 9:29, 9:30
- Metropolitan State Bank v. Cox, 134 Colo. 260, 302 P.2d 188 (1956)—30:28
- Metzger v. Baker, 93 Colo. 165, 24 P.2d 748 (1933)—19:14
- Metzger, People ex rel. v. Watrous, 121 Colo. 282, 215 P.2d 344 (1950)—30:25

## TABLE OF CASES

- Meuser v. Rocky Mountain Hosp., 685 P.2d 776 (Colo. App. 1984)—22:3
- Meyer v. Nelson, 69 Colo. 56, 168 P. 1175 (1917)—30:7
- Meyer v. Schwartz, 638 P.2d 821 (Colo. App. 1981)—26:2, 34:18
- Mid-Century Ins. Co. v. Heritage Drug, Ltd., 3 P.3d 461 (Colo. App. 1999)—9:1
- Middlemist v. BDO Seidman, LLP, 958 P.2d 486 (Colo. App. 1997)—31:4, 31:5, 31:12
- Midland Terminal Ry. Co. v. Patton, 74 Colo. 132, 219 P. 781 (1923)—12:17
- Midwest Mut. v. Heald, 106 Colo. 552, 108 P.2d 535 (1940)—26:2
- Midwest Mut. Ins. Co. v. Titus, 849 P.2d 908 (Colo. App. 1993)—11:17
- Mikes v. Burnett, 2013 COA 97, 411 P.3d 43 (Colo. App. 2013)—13:1
- Mile Hi Concrete, Inc. v. Matz, 842 P.2d 198 (Colo. 1992)—9:1, 14:5, 14:19
- Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971)—12:6, 12:7
- Millard v. Smith, 30 Colo. App. 466, 495 P.2d 234 (App. 1972)—13:1
- Miller v. Bank of New York Mellon, 2016 COA 95, 379 P.3d 342 (Colo. App. 2016)—30:16
- Miller v. Boma Inv. Co., 112 Colo. 7, 144 P.2d 988 (1944)—3:9
- Miller v. Brannon, 207 P.3d 923 (Colo. App. 2009)—6:1
- Miller v. Byrne, 916 P.2d 566 (Colo. App. 1995)—4:20, 5:4, 9:24, 9:28, 15:19, 15:20, 25:1, 25:2, 25:3, 25:8, 25:11
- Miller v. Carnation Co., 39 Colo. App. 1, 564 P.2d 127 (App. 1977)—18:4
- Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (App. 1973)—18:1, 18:2
- Miller v. Crown Mart, Inc., 162 Colo. 281, 425 P.2d 690 (1967)—12:6
- Miller v. Davis' Estate, 52 Colo. 485, 122 P. 793 (1912)—30:20
- Miller v. Hartford Cas. Ins. Co., 160 P.3d 408 (Colo. App. 2007)—25:1
- Miller v. Rowtech, LLC, 3 P.3d 492 (Colo. App. 2000)—15:21
- Miller v. Solaglas California, Inc., 870 P.2d 559 (Colo. App. 1993)—5:3, 5:4, 9:6, 9:30, 14:1, 14:2, 14:8, 14:10, 14:17, 14:22, 14:27, 14:29, 14:30, 14:30A
- Miller v. Van Newkirk, 628 P.2d 143 (Colo. App. 1980)—9:17, 15:11
- Millican v. Wolfe, 701 P.2d 107 (Colo. App. 1985)—9:2, 10:4
- Millington v. Hiedloff, 96 Colo. 581, 45 P.2d 937 (1935)—9:30
- Mince v. Butters, 200 Colo. 501, 616 P.2d 127 (1980)—5:4
- Mining Equipment Inc. v. Leadville Corp., 856 P.2d 81 (Colo. App. 1993)—5:2
- Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co., 119 U.S. 149, 7 S. Ct. 168, 30 L. Ed. 376 (1886)—30:4
- Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993)—21:11
- Minowitz v. Failing, 109 Colo. 182, 123 P.2d 417 (1942)—20:12
- Minshall v. Case, 148 Colo. 12, 364 P.2d 868 (1961)—30:42
- Minto v. Sprague, 124 P.3d 881 (Colo. App. 2005)—9:7, 9:7A, 9:17
- Mintz v. Accident and Injury Medical Specialists, PC, 284 P.3d 62 (Colo. App. 2010)—17:10, 17:12, 26:2
- Mladjan v. Public Service Co. of Colorado, 797 P.2d 1299 (Colo. App. 1990)—9:7

- Moffat County State Bank v. Told, 800 P.2d 1320 (Colo. 1990)—30:29
- Moffett v. Life Care Centers of America, 219 P.3d 1068 (Colo. 2009)—8:9
- Moffett v. Life Care Centers of America, 187 P.3d 1140 (Colo. App. 2008)—15:14
- Mogote-Northeastern Consol. Ditch Co. v. Gallegos, 70 Colo. 550, 203 P. 668 (1922)—18:4
- Moguls of Aspen, Inc. v. Faegre & Benson, 956 P.2d 618 (Colo. App. 1997)—15:18, 15:25, 26:1
- Molnar By and Through Molnar v. Law, 776 P.2d 1156 (Colo. App. 1989)—9:1, 20:5
- Molosz v. Hohertz, 957 P.2d 1049 (Colo. App. 1998)—9:1
- Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 108 S. Ct. 1837, 100 L. Ed. 2d 349 (1988)—6:1
- Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)—22:1
- Montano v. Land Title Guarantee Co., 778 P.2d 328 (Colo. App. 1989)—8:1, 16:1, 16:5, 32:1
- Montemayor v. Jacor Communications, Inc., 64 P.3d 916 (Colo. App. 2002)—30:10, 31:9
- Montes v. Hyland Hills Park and Recreation Dist., 849 P.2d 852 (Colo. App. 1992)—12:15
- Montgomery v. Tufford, 165 Colo. 18, 437 P.2d 36 (1968)—4:5, 32:3
- Montgomery Elevator Co. v. Gordon, 619 P.2d 66 (Colo. 1980)—9:17
- Montgomery Ward & Co. v. Kerns, 172 Colo. 59, 470 P.2d 34 (1970)—12:6
- Montgomery Ward & Co. v. Pherson, 129 Colo. 502, 272 P.2d 643 (1954)—17:1, 17:2, 17:3, 17:4, 17:7, 17:8
- Montgomery Ward & Co., Inc. v. Andrews, 736 P.2d 40 (Colo. App. 1987)—18:4, 23:1, 23:5, 24:1, 32:1
- Montgomery Ward & Co., Inc. v. City of Sterling, 185 Colo. 238, 523 P.2d 465 (1974)—36:3, 36:10
- Montoya v. Connolly's Towing, Inc., 216 P.3d 98 (Colo. App. 2008)—9:1, 16:1, 16:2, 16:5
- Montoya v. Grease Monkey Holding Corp., 883 P.2d 486 (Colo. App. 1994)—8:9, 8:10, 8:11
- Montoya v. City of Westminster Dept. of Public Works, 181 P.3d 1197 (Colo. App. 2008)—12:15
- Montoya By and Through Montoya v. Bebensee, 761 P.2d 285 (Colo. App. 1988)—9:2, 15:1, 23:2
- Moody v. A.G. Edwards & Sons, Inc., 847 P.2d 215 (Colo. App. 1992)—4:20, 6:1, 9:24, 9:28, 9:29
- Mooney v. Carter, 114 Colo. 267, 160 P.2d 390 (1945)—20:3, 20:5, 20:6, 20:7
- Moore v. Burt Chevrolet, Inc., 39 Colo. App. 11, 563 P.2d 369, 21 U.C.C. Rep. Serv. 1223 (App. 1977)—14:8
- Moore v. City and County of Denver, 42 P.3d 82 (Colo. App. 2002)—12:15
- Moore v. Georgeson, 679 P.2d 1099 (Colo. App. 1983)—23:2
- Moore v. Skiles, 130 Colo. 191, 274 P.2d 311 (1954)—11:18

## TABLE OF CASES

- Moore v. Standard Paint & Glass Co. of Pueblo, 145 Colo. 151, 358 P.2d 33 (1960)—9:20, 9:21
- Moore v. Switzer, 78 Colo. 63, 239 P. 874 (1925)—8:11, 8:12
- Moore v. Western Forge Corp., 192 P.3d 427 (Colo. App. 2007)—9:20, 23:1
- Moran v. Standard Ins. Co., 187 P.3d 1162 (Colo. App. 2008)—12:15, 25:2
- Moreau v. Buchholz, 124 Colo. 302, 236 P.2d 540 (1951)—41:6
- Morgan v. Board of Water Works of Pueblo, 837 P.2d 300 (Colo. App. 1992)—9:22, 12:15
- Morley v. Post Printing & Pub. Co., 84 Colo. 41, 268 P. 540 (1928)—22:1, 22:8, 22:10
- Morphew v. Ridge Crane Service, Inc., 902 P.2d 848 (Colo. App. 1995)—8:6, 8:7
- Morris v. Askeland Enterprises, Inc., 17 P.3d 830 (Colo. App. 2000)—5:4
- Morris v. Belfor USA Group, Inc., 201 P.3d 1253 (Colo. App. 2008)—30:10, 30:12, 30:15, 30:38
- Morris v. Goodwin, 185 P.3d 777 (Colo. 2008)—6:1, 15:14
- Morris v. Hokosona, 26 Colo. App. 251, 143 P. 826 (1914)—30:46
- Morrison v. Bradley, 655 P.2d 385 (Colo. 1982)—10:4
- Morrison v. Goff, 91 P.3d 1050 (Colo. 2004)—15:18
- Morrison v. Goodspeed, 100 Colo. 470, 68 P.2d 458 (1937)—19:1, 19:5, 19:7
- Mortgage Finance, Inc. v. Podleski, 742 P.2d 900 (Colo. 1987)—5:4, 25:11, 30:16
- Moseley v. Lamirato, 149 Colo. 440, 370 P.2d 450 (1962)—11:12
- Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993)—8:1, 8:4, 8:22, 9:1, 15:25, 26:2, 26:3
- Mosko v. Walton, 144 Colo. 602, 358 P.2d 49 (1960)—3:4
- Mosley v. Industrial Claim Appeals Office of State of Colo., 119 P.3d 576 (Colo. App. 2005)—25:2
- Motor Crane Service Co. v. Barker Const. Co., Inc., 650 P.2d 1329 (Colo. App. 1982)—16:5, 16:6
- Mountain Mobile Mix, Inc. v. Gifford, 660 P.2d 883 (Colo. 1983)—9:27, 9:28
- Mountain States Commercial Collections, Inc. v. 99 Cents Liquidators, Inc., 940 P.2d 934 (Colo. App. 1996)—8:2
- Mountain States Tel. & Tel. Co. v. Horn Tower Const. Co., 147 Colo. 166, 363 P.2d 175 (1961)—32:2
- Moye White LLP v. Beren, 2013 COA 89, 320 P.3d 373 (Colo. App. 2013)—15:18, 26:1
- M.S.P. Industries, Inc. v. Diversified Mortg. Services, Inc., 777 P.2d 237 (Colo. App. 1989)—8:14
- Mt. Hawley Insurance Company v. Casson Duncan Construction, Inc., 2016 COA 164, 409 P.3d 619 (Colo. App. 2016)—25:1, 30:31
- Mudd v. Dorr, 40 Colo. App. 74, 574 P.2d 97 (App. 1977)—9:17, 15:10
- Mulberger v. People, 2016 CO 10, 366 P.3d 143 (Colo. 2016)—8:4
- Mulei v. Jet Courier Service, Inc., 739 P.2d 889 (Colo. App. 1987)—24:5, 24:6

- Mulford v. Torrey Exploration Co., 45 Colo. 81, 100 P. 596 (1909)—30:13  
 Mulhern v. Hederich, 163 Colo. 275, 430 P.2d 469 (1967)—30:54  
 Mullen v. Allstate Ins. Co., 232 P.3d 168 (Colo. App. 2009)—9:4, 19:4, 19:5, 25:8  
 Munoz v. American Family Mutual Insurance Company, 2018 CO 68, 425 P.3d 1128 (Colo. 2018)—25:2  
 Munoz v. State Farm Mut. Auto. Ins. Co., 968 P.2d 126 (Colo. App. 1998)—23:1, 23:2, 25:2  
 Murphy v. Central Bank and Trust Co., 699 P.2d 13 (Colo. App. 1985)—26:5  
 Murphy v. Colorado Aviation, Inc., 41 Colo. App. 237, 588 P.2d 877 (App. 1978)—10:4  
 Murphy v. Hobbs, 8 Colo. 17, 5 P. 637 (1884)—32:1, 32:3  
 Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884)—17:9  
 Murray v. Just In Case Business Lighthouse, LLC, 2016 CO 47M, 374 P.3d 443 (Colo. 2016)—3:16  
 Murray v. Montgomery Ward Life Ins. Co., 196 Colo. 225, 584 P.2d 78 (1978)—30:18  
 Mustang Reservoir, Canal & Land Co. v. Hissman, 49 Colo. 308, 112 P. 800 (1911)—18:4  
 M.W. v. D.G., 710 P.2d 1174 (Colo. App. 1985)—3:2  
 Myers v. Beem, 712 P.2d 1092 (Colo. App. 1985)—15:21, 15:22  
 Myers v. Koop, 757 P.2d 162, 7 U.C.C. Rep. Serv. 2d 461 (Colo. App. 1988)—14:8  
 Myers v. Woodall, 42 Colo. App. 44, 592 P.2d 1343 (App. 1978)—15:2

N

- Nahring v. City and County of Denver By and Through Bd. of Water Com'rs, 174 Colo. 548, 484 P.2d 1235 (1971)—30:31  
 Napolitano v. Napolitano, 732 P.2d 245 (Colo. App. 1986)—7:2  
 Nash v. School Bd. No. 3, Clear Creek County, 49 Colo. 555, 113 P. 1003 (1911)—30:3  
 National Const. Co. v. Holt, 137 Colo. 208, 322 P.2d 1046 (1958)—9:12  
 National Farmers Union Property and Cas. Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983)—4:20, 9:26  
 National Fuel Co. v. Green, 50 Colo. 307, 115 P. 709 (1911)—6:2  
 National Propane Corp. v. Miller, 18 P.3d 782 (Colo. App. 2000)—30:12  
 NBC Subsidiary (KCNC-TV), Inc. v. Living Will Center, 879 P.2d 6 (Colo. 1994)—22:1, 22:2, 22:12, 22:13  
 N.D.V., People ex rel., 224 P.3d 410 (Colo. App. 2009)—41:1  
 Neiheisel v. Malone, 150 Colo. 586, 375 P.2d 197 (1962)—30:18  
 Neil v. Espinoza, 747 P.2d 1257 (Colo. 1987)—4:3, 4:4  
 Nelson v. Caterpillar Tractor Co., 694 P.2d 867 (Colo. App. 1984)—14:25, 14:27  
 Nelson v. Centennial Cas. Co., 130 Colo. 66, 273 P.2d 121 (1954)—31:1, 31:3  
 Nelson v. Elway, 971 P.2d 245 (Colo. App. 1998)—26:1  
 Nelson v. Elway, 908 P.2d 102 (Colo. 1995)—27:1, 30:7  
 Nelson v. Gas Research Institute, 121 P.3d 340 (Colo. App. 2005)—9:4, 19:1, 19:3

## TABLE OF CASES

- Nelson v. Van Schaack & Co., 87 Colo. 199, 286 P. 865 (1930)—19:11
- Nemer v. Anderson, 151 Colo. 411, 378 P.2d 841 (1963)—6:5
- Ness v. Glasscock, 781 P.2d 137 (Colo. App. 1989)—31:4
- Neuromonitoring Associates v. Centura Health Corp., 2012 COA 136, 351 P.3d 486 (Colo. App. 2012)—30:26
- Nevin v. Bates, 141 Colo. 255, 347 P.2d 776 (1959)—30:39
- Newbury v. Vogel, 151 Colo. 520, 379 P.2d 811 (1963)—6:8
- Newcomb v. Schaeffler, 131 Colo. 56, 279 P.2d 409 (1955)—30:12, 30:49, 30:54
- New Design Constr. Co., Inc. v. Hamon Contractors, Inc., 215 P.3d 1172 (Colo. App. 2008)—30:16
- Newflower Market, Inc. v. Cook, 229 P.3d 1058 (Colo. App. 2010)—30:16
- Newton By and Through Newton on Behalf of Newton, Estate of v. McNew, 698 P.2d 835 (Colo. App. 1984)—9:20, 9:21
- New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964)—22:1, 22:2, 22:3, 22:15, 22:27
- N.G., People ex rel., 2012 COA 131, 303 P.3d 1207 (Colo. App. 2012)—41:1
- Nibert v. Geico Casualty Company, 2017 COA 23, 2017 WL 710504 (Colo. App. 2017)—25:4, 25:10
- Nicholson v. Ash, 800 P.2d 1352 (Colo. App. 1990)—26:2, 26:4, 34:18
- Nicol v. Nelson, 776 P.2d 1144 (Colo. App. 1989)—30:7
- Nielson v. Scott, 53 P.3d 777 (Colo. App. 2002)—19:1, 19:2, 19:10
- Niemand v. District Court In and For Jefferson County, First Judicial Dist., 684 P.2d 931 (Colo. 1984)—1:5, 4:1
- Niernberg, by Niernberg v. Gavin, 123 Colo. 1, 224 P.2d 215 (1950)—12:4
- Nieto v. State, 952 P.2d 834 (Colo. App. 1997)—15:1
- Nikolai v. Farmers Alliance Mut. Ins. Co., 830 P.2d 1070 (Colo. App. 1991)—25:1
- N.M. by and through Lopez v. Trujillo, 2017 CO 79, 397 P.3d 370 (Colo. 2017)—9:1, 13:1
- Nordin v. Madden, 148 P.3d 218 (Colo. App. 2006)—12:1, 12:2, 12:3
- Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689, 10 Fed. R. Evid. Serv. 130 (1980)—6:10
- North American Sav. & Loan Ass'n v. Phillips, 94 Colo. 554, 31 P.2d 492 (1934)—19:17
- Northglenn, City of v. Grynberg, 846 P.2d 175 (Colo. 1993)—36:1
- Norton v. Gilman, 949 P.2d 565 (Colo. 1997)—8:4
- Novak v. Craven, 195 P.3d 1115 (Colo. App. 2008)—9:14
- Novell v. American Guar. and Liability Ins. Co., 15 P.3d 775 (Colo. App. 1999)—25:2, 30:31
- Novelty Theater Co. v. Whitcomb, 47 Colo. 110, 106 P. 1012 (1909)—8:22
- Nucla Sanitation Dist. v. Rippy, 140 Colo. 444, 344 P.2d 976 (1959)—30:6
- Nunn v. Mid-Century Ins. Co., 244 P.3d 116 (Colo. 2010)—25:1
- Nunnally v. Hilderman, 150 Colo. 363, 373 P.2d 940 (1962)—8:14
- Nutting v. Northern Energy, Inc., 874 P.2d 482 (Colo. App. 1994)—9:14, 9:17

O

- O'Brien v. Wallace, 145 Colo. 291, 359 P.2d 1029 (1961)—34:2, 34:6
- Observatory Corp. v. Daly, 780 P.2d 462 (Colo. 1989)—9:1
- Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971)—22:1
- Ochoa v. Vered, 212 P.3d 963 (Colo. App. 2009)—9:17, 9:24, 9:28, 9:29, 15:1, 15:14, 15:15
- O'Connell v. Biomet, Inc., 250 P.3d 1278 (Colo. App. 2010)—14:4, 15:1
- O'Connor v. Rolfes, 899 P.2d 227 (Colo. App. 1994)—18:4
- Odell v. Public Service Co., 158 Colo. 404, 407 P.2d 330 (1965)—6:2, 6:3
- Odenbaugh v. County of Weld, 809 P.2d 1059 (Colo. App. 1990)—12:15
- Ofengand, People ex rel. Ofengand, 183 P.3d 688 (Colo. App. 2008)—35:1
- Ogden v. McChesney, 41 Colo. App. 191, 584 P.2d 636 (App. 1978)—12:12
- O'Hara Group Denver, Ltd. v. Marcor Housing Systems, Inc., 197 Colo. 530, 595 P.2d 679 (1979)—30:40
- Oil Bldg. Corp. v. Hermann, 29 Colo. App. 564, 488 P.2d 1126 (App. 1971)—9:17
- Oldis v. Grosse-Rhode, 35 Colo. App. 46, 528 P.2d 944 (App. 1974)—30:40
- Old Republic Ins. Co. v. Ross, 180 P.3d 427 (Colo. 2008)—25:1, 25:9
- Oliver v. Weaver, 72 Colo. 540, 212 P. 978 (1923)—6:1, 9:15
- Olschansky, Matter of Estate of, 735 P.2d 927 (Colo. App. 1987)—34:6
- Olsen v. Bondurant and Co., 759 P.2d 861 (Colo. App. 1988)—8:4, 30:7
- Olsen v. Vail Associates Real Estate, Inc., 935 P.2d 975 (Colo. 1997)—8:1
- Olsen and Brown v. City of Englewood, 889 P.2d 673 (Colo. 1995)—15:18
- Olson v. State Farm Mut. Auto. Ins. Co., 174 P.3d 849 (Colo. App. 2007)—25:1, 25:2, 25:8, 26:2
- Olson Plumbing & Heating, Inc. v. Douglas Jardine, Inc., 626 P.2d 750 (Colo. App. 1981)—30:49
- Omaha & Grant Smelting & Refining Co. v. Tabor, 13 Colo. 41, 21 P. 925 (1889)—18:4, 32:1, 32:3
- O'Malley-Kelley Oil & Auto Supply Co. v. Gates Oil Co., 73 Colo. 140, 214 P. 398 (1923)—17:6
- Omedelena v. Denver Options, Inc., 60 P.3d 717 (Colo. App. 2002)—24:1
- One Creative Place, LLC v. Jet Center Partners, LLC, 259 P.3d 1287 (Colo. App. 2011)—29:4
- O'Neil v. International Harvester Co., 40 Colo. App. 369, 575 P.2d 862, 23 U.C.C. Rep. Serv. 1152 (App. 1978)—14:9
- O'Reilly v. Physicians Mut. Ins. Co., 992 P.2d 644 (Colo. App. 1999)—30:16
- Orth v. Bauer, 163 Colo. 136, 429 P.2d 279 (1967)—9:14, 11:10
- Ortho Pharmaceutical Corp. v. Heath, 722 P.2d 410 (Colo. 1986)—14:3, 14:26
- Osborn v. Razatos Realty Co., 158 Colo. 446, 407 P.2d 342 (1965)—30:56
- Otis & Co. v. Grimes, 97 Colo. 219, 48 P.2d 788 (1935)—19:1, 19:17
- Otoupalik v. Phelps, 73 Colo. 433, 216 P. 541 (1923)—16:2

## TABLE OF CASES

Overland Development Co. v. Marston Slopes Development Co., 773 P.2d 1112 (Colo. App. 1989)—19:1, 30:41

Owners Insurance Company v. Dakota Station II Condominium Association, Inc., 2019 CO 65, 443 P.3d 47 (Colo. 2019)—30:31, 30:33

## P

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991)—5:4

Pack v. Arkansas Valley Correctional Facility, 894 P.2d 34, 10 A.D.D. 418 (Colo. App. 1995)—12:15

Padilla ex rel. Padilla v. School Dist. No. 1 in City and County of Denver, 25 P.3d 1176, 155 Ed. Law Rep. 869 (Colo. 2001)—12:15

Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)—3:1, 3:2, 34:18

Page, In re Marriage of, 70 P.3d 579 (Colo. App. 2003)—26:4, 34:18

Paine, Webber, Jackson & Curtis, Inc. v. Adams, 718 P.2d 508 (Colo. 1986)—5:4, 26:1, 26:2, 26:3, 26:5

Palipchak v. Kent Const. Co., 38 Colo. App. 146, 554 P.2d 718 (App. 1976)—30:31

Palizzi v. City of Brighton, 228 P.3d 957 (Colo. 2010)—36:3, 36:6

Palmer v. A.H. Robins Co., Inc., 684 P.2d 187, 38 U.C.C. Rep. Serv. 1150 (Colo. 1984)—5:4, 9:14, 9:30, 14:8, 14:9, 14:10, 14:13, 14:19

Palmer v. Diaz, 214 P.3d 546 (Colo. App. 2009)—3:4, 5:4, 6:1, 23:1, 23:6

P & M Vending Co., Inc. v. Half Shell of Boston, Inc., 41 Colo. App. 78, 579 P.2d 93 (App. 1978)—30:40

Paris ex rel. Paris v. Dance, 194 P.3d 404 (Colo. App. 2008)—9:1, 9:25, 9:29, 12:1

Parker v. Ullom, 84 Colo. 433, 271 P. 187 (1928)—7:5, 11:2

Park Rise Homeowners Ass'n, Inc. v. Resource Const. Co., 155 P.3d 427 (Colo. App. 2006)—29:1, 29:3

Parr v. Triple L & J Corp., 107 P.3d 1104 (Colo. App. 2004)—5:4

Parrish v. Smith, 102 Colo. 250, 78 P.2d 629 (1938)—9:14

Parrish Chiropractic Centers, P.C. v. Progressive Cas. Ins. Co., 874 P.2d 1049 (Colo. 1994)—30:9, 30:17

Parsons ex rel. Parsons v. Allstate Ins. Co., 165 P.3d 809 (Colo. App. 2006)—25:2, 25:6

Passamano v. Travelers Indem. Co., 835 P.2d 514 (Colo. App. 1991)—16:1

Patane v. Broadmoor Hotel, Inc., 708 P.2d 473 (Colo. App. 1985)—22:18

Patrick v. Colorado Smelting Co., 20 Colo. 268, 38 P. 236 (1894)—30:41

Patterson v. BP America Production Company, 2015 COA 28, 360 P.3d 211 (Colo. App. 2015)—19:2, 19:8

Patterson v. Gage, 11 Colo. 50, 16 P. 560 (1888)—30:35

Patterson v. Magna American Corp., 754 P.2d 1385 (Colo. App. 1988)—14:5, 14:5B, 14:17, 14:27

Patridge v. Youmans, 107 Colo. 122, 109 P.2d 646 (1941)—19:1, 19:10

Paulsen v. Rourke, 26 Colo. App. 488, 145 P. 711 (1915)—8:16

Pawnee Farmers' Elevator Co. v. Powell, 76 Colo. 1, 227 P. 836, 37 A.L.R. 6 (1924)—6:2, 6:3, 7:2

Payan v. Nash Finch Co., 2012 COA 135M, 310 P.3d 212 (Colo. App. 2012)—29:5

- Payberg v. Harris, 931 P.2d 544 (Colo. App. 1996)—9:1
- Payne v. Russ Vento Chevrolet, Inc., 528 P.2d 935 (Colo. App. 1974)—32:3
- Pearson v. Kancilia, 70 P.3d 594 (Colo. App. 2003)—23:1, 23:2, 28:1, 28:2
- Pearson v. Norman, 106 Colo. 396, 106 P.2d 361 (1940)—15:6, 15:24, 15:30
- Pedge v. RM Holdings, Inc., 75 P.3d 1126 (Colo. App. 2002)—4:20, 9:28, 12:3
- Pediatric Neurosurgery, P.C. v. Russell, 44 P.3d 1063 (Colo. 2002)—8:22, 15:1
- Pegram v. Herdrich, 530 U.S. 211, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000)—25:2
- Peiffer v. State Farm Mut. Auto. Ins. Co., 940 P.2d 967 (Colo. App. 1996)—25:2, 25:6
- Peltz v. Shidler, 952 P.2d 793 (Colo. App. 1997)—15:18
- Pence v. Chaudet, 163 Colo. 104, 428 P.2d 705 (1967)—9:12
- People v. Barrus, 232 P.3d 264 (Colo. App. 2009)—21:11
- People v. Bowles, 226 P.3d 1125 (Colo. App. 2009)—21:11
- People v. Brandyberry, 812 P.2d 674 (Colo. App. 1990)—9:15
- People v. Brown, 217 P.3d 1252 (Colo. 2009)—21:13
- People v. Campos, 2015 COA 47, 351 P.3d 553 (Colo. App. 2015)—25:4
- People v. Contreras, 780 P.2d 552 (Colo. 1989)—21:13
- People v. Cook, 665 P.2d 640 (Colo. App. 1983)—21:13
- People v. Cornett, 685 P.2d 224 (Colo. App. 1984)—1:5
- People v. D. A. K., 198 Colo. 11, 596 P.2d 747 (1979)—41:8, 41:9, 41:12
- People v. Davis, 903 P.2d 1 (Colo. 1995)—21:13
- People v. Diaz, 793 P.2d 1181 (Colo. 1990)—21:6, 21:13
- People v. Fears, 962 P.2d 272 (Colo. App. 1997)—21:13
- People v. Fields, 785 P.2d 611 (Colo. 1990)—21:13
- People v. Florez, 680 P.2d 219 (Colo. 1984)—21:13, 21:14, 21:15
- People v. Foster, 788 P.2d 825 (Colo. 1990)—21:13
- People v. Freeman, 668 P.2d 1371, 51 A.L.R.4th 473 (Colo. 1983)—21:13
- People v. Garner, 806 P.2d 366 (Colo. 1991)—3:1
- People v. Gouker, 665 P.2d 113 (Colo. 1983)—21:11, 21:13
- People v. Guenther, 740 P.2d 971 (Colo. 1987)—20:12
- People v. Hamilton, 666 P.2d 152 (Colo. 1983)—21:14, 21:15
- People v. Harlan, 109 P.3d 616 (Colo. 2005)—1:5, 4:1A
- People v. Hazelhurst, 662 P.2d 1081 (Colo. 1983)—21:12, 21:13
- People v. Holmberg, 992 P.2d 705 (Colo. App. 1999)—21:13
- People v. Hunsaker, 2013 COA 5, 411 P.3d 36 (Colo. App. 2013)—30:32
- People v. Janes, 982 P.2d 300 (Colo. 1999)—20:12
- People v. King, 16 P.3d 807 (Colo. 2001)—21:13
- People v. Knobee, 2020 COA 7, 2020 WL 238712 (Colo. App. 2020)—3:3
- People v. Kriho, 996 P.2d 158 (Colo. App. 1999)—4:1A
- People v. Lane, 196 Colo. 42, 581 P.2d 719 (1978)—3:2
- People v. Lesko, 701 P.2d 638 (Colo. App. 1985)—21:13
- People v. Macrander, 828 P.2d 234 (Colo. 1992)—30:34

## TABLE OF CASES

- People v. McCain, 191 Colo. 229, 552 P.2d 20 (1976)—7:4  
 People v. McCoy, 870 P.2d 1231 (Colo. 1994)—21:13  
 People v. McKay, 10 P.3d 704 (Colo. App. 2000)—21:14  
 People v. Mitchell, 678 P.2d 990 (Colo. 1984)—21:17  
 People v. Novotny, 2014 CO 18, 320 P.3d 1194 (Colo. 2014)—30:34  
 People v. Olguin, 187 Colo. 34, 528 P.2d 234 (1974)—21:10, 21:11, 21:16  
 People v. O'Neal, 32 P.3d 533 (Colo. App. 2000)—21:12  
 People v. Pate, 705 P.2d 519 (Colo. 1985)—21:13  
 People v. Perez, 852 P.2d 1297 (Colo. App. 1992)—21:11  
 People v. Pflugbeil, 834 P.2d 843 (Colo. App. 1992)—35:1  
 People v. Quintana, 701 P.2d 1264 (Colo. App. 1985)—21:13  
 People v. Ratcliff, 778 P.2d 1371 (Colo. 1989)—21:13  
 People v. Raymer, 662 P.2d 1066 (Colo. 1983)—21:19  
 People v. Reed, 42 Colo. App. 275, 598 P.2d 148 (App. 1979)—1:5  
 People v. Robinson, 226 P.3d 1145 (Colo. App. 2009)—21:13  
 People v. Rotello, 754 P.2d 765 (Colo. 1988)—32:4  
 People v. Roybal, 655 P.2d 410 (Colo. 1982)—21:13  
 People v. Rueda, 649 P.2d 1106 (Colo. 1982)—21:13  
 People v. Schultz, 200 Colo. 47, 611 P.2d 977 (1980)—21:15  
 People v. Stevens, 761 P.2d 768 (Colo. 1988)—35:1  
 People v. Summitt, 104 P.3d 232 (Colo. App. 2004)—21:11  
 People v. Taylor, 41 P.3d 681 (Colo. 2002)—21:12  
 People v. Taylor, 618 P.2d 1127 (Colo. 1980)—35:1, 35:3, 35:4  
 People v. Thompson, 793 P.2d 1173 (Colo. 1990)—21:13  
 People v. Tibbels, 2019 COA 175, 2019 WL 6333746 (Colo. App. 2019)—  
     3:3  
 People v. Toler, 9 P.3d 341 (Colo. 2000)—20:13  
 People v. Tottenhoff, 691 P.2d 340 (Colo. 1984)—21:12  
 People v. Interest of T.T., 128 P.3d 328 (Colo. App. 2005)—41:4, 41:7  
 People v. Tufts, 717 P.2d 485 (Colo. 1986)—21:13  
 People v. Villiard, 679 P.2d 593 (Colo. 1984)—21:13  
 People v. Wadle, 97 P.3d 932 (Colo. 2004)—1:5, 4:1A  
 People v. Washington, 865 P.2d 145 (Colo. 1994)—21:13  
 People v. Whitaker, 32 P.3d 511 (Colo. App. 2000)—21:12  
 People v. Willcoxon, 80 P.3d 817 (Colo. App. 2002)—1:9  
 People v. Wolf, 635 P.2d 213 (Colo. 1981)—21:11, 21:14  
 People v. Wunder, 2016 COA 46, 371 P.3d 785 (Colo. App. 2016)—29:5  
 People v. Zamarripa-Diaz, 187 P.3d 1120 (Colo. App. 2008)—1:17  
 People in Interest of A.M., 786 P.2d 476 (Colo. App. 1989)—41:1  
 People in Interest of A. M. D., 648 P.2d 625 (Colo. 1982)—41:1  
 People in Interest of Bailey, 745 P.2d 280 (Colo. App. 1987)—35:1  
 People in Interest of Bucholz, 778 P.2d 300 (Colo. App. 1989)—35:4  
 People in Interest of C.C.G., 873 P.2d 41 (Colo. App. 1994)—41:13  
 People in Interest of Clinton, 762 P.2d 1381 (Colo. 1988)—35:1  
 People in Interest of C. R. v. E. L., 38 Colo. App. 252, 557 P.2d 1225  
     (App. 1976)—41:7, 41:8  
 People in Interest of D. L. E., 645 P.2d 271 (Colo. 1982)—41:7

- People in Interest of D. L. R., 638 P.2d 39 (Colo. 1981)—41:4, 41:11, 41:16
- People in Interest of Dveirin, 755 P.2d 1207 (Colo. 1988)—35:2
- People in Interest of F. M., 44 Colo. App. 142, 609 P.2d 1123 (App. 1980)—41:6
- People in Interest of Hoylman, 865 P.2d 918 (Colo. App. 1993)—35:1
- People In Interest of J.G., 2016 CO 39, 370 P.3d 1151 (Colo. 2016)—41:3, 41:5, 41:10, 41:17
- People in Interest of King, 795 P.2d 273 (Colo. App. 1990)—35:1, 35:2, 35:5
- People in Interest of Kleinfeldt, 680 P.2d 864 (Colo. App. 1984)—35:1, 35:2
- People in Interest of Lees, 745 P.2d 281 (Colo. App. 1987)—35:2
- People in Interest of Lloyd-Pellman, 844 P.2d 1309 (Colo. App. 1992)—35:1
- People in Interest of Lynch, 783 P.2d 848 (Colo. 1989)—35:1
- People in Interest of M.A.L., 37 Colo. App. 307, 592 P.2d 415 (1976)—41:8
- People In Interest of M.C.S., 2014 COA 46, 327 P.3d 360 (Colo. App. 2014)—41:1
- People In Interest of M.H-K., 2018 COA 178, 433 P.3d 627 (Colo. App. 2018)—41:1, 41:4
- People in Interest of M.N., 950 P.2d 674 (Colo. App. 1997)—41:1
- People In Interest of M.V., 2018 COA 163, 432 P.3d 628 (Colo. App. 2018)—41:10
- People in Interest of O.E.P., 654 P.2d 312 (Colo. 1982)—41:1
- People in Interest of PDS, 669 P.2d 627 (Colo. App. 1983)—41:1, 41:5
- People In Interest of R.E., 729 P.2d 1032 (Colo. App. 1986)—41:1
- People In Interest of R.K.L., 2016 COA 84, 412 P.3d 827 (Colo. App. 2016)—35:4, 35:5
- People in Interest of Santorufo, 844 P.2d 1234 (Colo. App. 1992)—35:1
- People in Interest of S. S. T., 38 Colo. App. 110, 553 P.2d 82 (App. 1976)—41:17
- People in Interest of T.M., 742 P.2d 905 (Colo. 1987)—40:1
- People in Interest of T.R.W., 759 P.2d 768 (Colo. App. 1988)—41:17
- Pepcol Mfg. Co. v. Denver Union Corp., 687 P.2d 1310 (Colo. 1984)—30:31
- Peppers v. Metzler, 71 Colo. 234, 205 P. 945 (1922)—19:17
- Peppler, In re Estate of, 971 P.2d 694 (Colo. App. 1998)—34:1
- Perez v. Grovert, 962 P.2d 996 (Colo. App. 1998)—12:9
- Perino v. Jarvis, 135 Colo. 393, 312 P.2d 108 (1957)—30:40
- Perkins v. Regional Transp. Dist., 907 P.2d 672 (Colo. App. 1995)—8:4, 8:5
- Perkins v. Westcoat, 3 Colo. App. 338, 33 P. 139 (1893)—30:21
- Perl-Mack Enterprises Co. v. City and County of Denver, 194 Colo. 4, 568 P.2d 468 (1977)—30:35
- Perreira v. State, 768 P.2d 1198 (Colo. 1989)—9:1
- Perry, In re Estate of, 33 P.3d 1235 (Colo. App. 2001)—34:9
- Perry Lumber Co. v. Ruybal, 133 Colo. 502, 297 P.2d 531 (1956)—9:12

# TABLE OF CASES

- Persichini v. Brad Ragan, Inc., 735 P.2d 168, 4 U.C.C. Rep. Serv. 2d 96 (Colo. 1987)—14:10
- Peterman v. State Farm Mut. Auto. Ins. Co., 961 P.2d 487 (Colo. 1998)—25:8
- Peters v. Boulder Ins. Agency, Inc., 829 P.2d 429 (Colo. App. 1991)—25:2
- Peterson v. Colorado Potato Flake & Mfg. Co., 164 Colo. 304, 435 P.2d 237 (1967)—5:6
- Peterson v. Halsted, 829 P.2d 373 (Colo. 1992)—9:1
- Peterson v. Kessler, 135 Colo. 102, 308 P.2d 610 (1957)—9:6
- Peterson v. McMahon, 99 P.3d 594 (Colo. 2004)—5:4
- Peterson v. Parke Davis & Co., 705 P.2d 1001, 58 A.L.R.4th 1 (Colo. App. 1985)—14:4, 14:27
- Peterson v. Tadolini, 97 P.3d 359 (Colo. App. 2004)—6:1
- Pete's Satire, Inc. v. Commercial Union Ins., Co., 698 P.2d 1388 (Colo. App. 1985)—26:5
- Pettingell v. Moede, 129 Colo. 484, 271 P.2d 1038 (1954)—9:30
- P. F. v. Walsh, 648 P.2d 1067 (Colo. 1982)—35:1, 35:2
- Pham v. OSP Consultants, Inc., 992 P.2d 657 (Colo. App. 1999)—8:8
- Pham v. State Farm Mut. Auto. Ins. Co., 70 P.3d 567 (Colo. App. 2003)—25:2, 25:3, 25:8
- Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986)—22:1, 22:13
- Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007)—5:4
- Philips Industries, Inc. v. Mathews, Inc., 711 P.2d 704 (Colo. App. 1985)—8:14
- Phillips v. Denver City Tramway Co., 53 Colo. 458, 128 P. 460 (1912)—9:1, 9:31, 10:2
- Phillips v. Monarch Recreation Corp., 668 P.2d 982 (Colo. App. 1983)—5:6, 6:1, 9:14
- Phipps v. Mitze, 116 Colo. 288, 180 P.2d 233 (1947)—12:4
- Phoenix Power Partners, L.P. v. Colorado Public Utilities Com'n, 952 P.2d 359 (Colo. 1998)—30:29
- Pickell v. Arizona Components Co., 931 P.2d 1184 (Colo. 1997)—31:1, 31:5
- Pickell v. Arizona Components Co., 902 P.2d 392 (Colo. App. 1994)—30:7, 31:4
- Pierce v. Ackerman, 488 P.2d 1118, 9 U.C.C. Rep. Serv. 1057 (Colo. App. 1971)—32:1
- Pierce v. Capitol Life Ins. Co., 806 P.2d 388 (Colo. App. 1990)—25:2, 25:3
- Pierce v. Conners, 20 Colo. 178, 37 P. 721 (1894)—8:22, 10:4
- Pierce v. St. Vrain Valley School Dist. Re-1J, 944 P.2d 646, 121 Ed. Law Rep. 351 (Colo. App. 1997)—22:3, 22:13, 22:16, 23:1, 24:1
- Pierce v. Wiglesworth, 903 P.2d 656 (Colo. App. 1994)—27:1
- Pierson v. Black Canyon Aggregates, Inc., 48 P.3d 1215 (Colo. 2002)—12:1, 12:2, 12:3
- Pietrafeso v. D.P.I., Inc., 757 P.2d 1113 (Colo. App. 1988)—22:1

- Piggott v. Schachet, 76 Colo. 434, 232 P. 1112 (1925)—34:15
- Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987)—25:2
- Pioneer Const. Co. v. Bergeron, 170 Colo. 474, 462 P.2d 589 (1969)—6:5
- Pittman v. Larson Distributing Co., 724 P.2d 1379 (Colo. App. 1986)—19:1, 22:1, 22:16, 22:18, 30:20, 31:1, 31:3, 31:5, 31:12
- Pitts v. National Independent Fisheries Co., 71 Colo. 316, 206 P. 571, 34 A.L.R. 1033 (1922)—30:28
- Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671, 55 A.L.R.4th 607 (Colo. 1985)—3:6, 5:4, 9:7, 9:12, 9:13
- Plains Iron Works Co. v. Haggott, 68 Colo. 121, 188 P. 735 (1920)—30:7
- Planned Pethood Plus, Inc. v. KeyCorp, Inc., 228 P.3d 262 (Colo. App. 2010)—30:40
- Platt v. Aspenwood Condominium Ass'n, Inc., 214 P.3d 1060 (Colo. App. 2009)—9:4, 19:1, 30:16
- Platt v. Walker, 69 Colo. 584, 196 P. 190 (1921)—32:2
- Plotkin v. Club Valencia Condominium Ass'n, Inc., 717 P.2d 1027 (Colo. App. 1986)—18:1
- Podboy v. Fraternal Order of Police, Denver Sheriff Lodge 27, 94 P.3d 1226 (Colo. App. 2004)—12:15
- Polster v. Griff's of America, Inc., 184 Colo. 418, 520 P.2d 745 (1974)—1:11
- Polster v. Griff's of America, Inc., 32 Colo. App. 264, 514 P.2d 80 (App. 1973)—6:10
- Poly Trucking, Inc. v. Concentra Health Services, Inc., 93 P.3d 561 (Colo. App. 2004)—19:2, 19:5
- Polz v. Donnelly, 121 Colo. 95, 213 P.2d 385 (1949)—3:4
- Pomeranz v. Class, 82 Colo. 173, 257 P. 1086 (1927)—21:15, 21:17
- Pomeranz v. McDonald's Corp., 843 P.2d 1378 (Colo. 1993)—30:38, 30:41, 30:49
- Pomeranz v. McDonald's Corp., 821 P.2d 843 (Colo. App. 1991)—5:2
- Ponder v. Altura Farms Co., 57 Colo. 519, 143 P. 570 (1914)—19:16
- Porter v. Castle Rock Ford Lincoln Mercury, Inc., 895 P.2d 1146 (Colo. App. 1995)—31:7
- Portercare Adventist Health System v. Lego, 2012 CO 58, 286 P.3d 525 (Colo. 2012)—30:26
- Pospicil v. Hammers, 148 Colo. 207, 365 P.2d 228 (1961)—30:28
- Potter v. Thieman, 770 P.2d 1348 (Colo. App. 1989)—10:3
- Potthoff v. Alms, 41 Colo. App. 51, 583 P.2d 309 (App. 1978)—14:3, 14:4
- Poudre Valley Furniture Co. v. Craw, 80 Colo. 353, 251 P. 543 (1926)—8:14
- Pouppirt v. Greenwood, 48 Colo. 405, 110 P. 195 (1910)—19:5
- Powder Horn Constructors, Inc. v. City of Florence, 754 P.2d 356 (Colo. 1988)—30:40
- Powell v. Brady, 30 Colo. App. 406, 496 P.2d 328 (App. 1972)—15:1
- Powell v. Landis, 95 Colo. 375, 36 P.2d 462 (1934)—19:15
- Powell v. Nevada, 511 U.S. 79, 114 S. Ct. 1280, 128 L. Ed. 2d 1 (1994)—21:19
- Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (App. 1973)—9:22

## TABLE OF CASES

- Pratt v. Rocky Mountain Natural Gas Co., Inc., 805 P.2d 1144 (Colo. App. 1990)—14:27
- Premier Farm Credit, PCA v. W-Cattle, LLC, 155 P.3d 504 (Colo. App. 2006)—26:2, 30:20
- Prentiss v. Johnston, 119 Colo. 370, 203 P.2d 733 (1949)—11:9
- Pressey by and through Pressey v. Children's Hospital Colorado, 2017 COA 28, 2017 WL 929931 (Colo. App. 2017)—6:1, 6:2, 6:3, 7:1, 7:2, 15:15
- Preston v. Dupont, 35 P.3d 433 (Colo. 2001)—4:20, 6:1, 15:14, 15:15
- Price v. Conoco, Inc., 748 P.2d 349 (Colo. App. 1987)—22:18
- Price v. Sommermeyer, 41 Colo. App. 147, 584 P.2d 1220 (App. 1978)—7:5, 11:18
- Pringle v. Valdez, 171 P.3d 624 (Colo. 2007)—5:3, 6:1
- Protect Our Mountain Environment, Inc. v. District Court In and For Jefferson County, 677 P.2d 1361 (Colo. 1984)—17:10, 22:1
- Prudential Ins. Co. of America v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936)—3:16
- Prutch v. Ford Motor Co., 618 P.2d 657, 29 U.C.C. Rep. Serv. 1507 (Colo. 1980)—14:1, 14:8
- Public Service Co. of Colorado v. District Court In and For Twenty-First Judicial Dist., 674 P.2d 383 (Colo. 1984)—10:4
- Public Service Co. of Colorado v. Petty, 75 Colo. 454, 226 P. 297 (1924)—9:1, 9:25
- Public Service Co. of Colorado v. Van Wyk, 27 P.3d 377 (Colo. 2001)—18:1, 36:4
- Publix Cab Co. v. Colorado Nat. Bank of Denver, 139 Colo. 205, 338 P.2d 702, 78 A.L.R.2d 198 (1959)—5:7, 10:3
- Pueblo, City of v. Leach Realty Co., 149 Colo. 92, 368 P.2d 195 (1962)—30:56
- Pueblo & A.V.R. Co. v. Rudd, 5 Colo. 270, 1880 WL 160 (1880)—36:11
- Pullman Palace-Car Co. v. Barker, 4 Colo. 344, 1878 WL 277 (1878)—6:1
- Pulte Home Corporation, Inc. v. Countryside Community Association, Inc., 2016 CO 64, 382 P.3d 821 (Colo. 2016)—30:32
- P.W. v. Children's Hospital Colorado, 2016 CO 6, 364 P.3d 891 (Colo. 2016)—9:1, 9:6, 9:21, 9:22, 15:6
- Pyles-Knutzen v. Board of County Com'rs of County of Pitkin, 781 P.2d 164 (Colo. App. 1989)—6:1, 7:5

## Q

- Quigley v. Jobe, 851 P.2d 236 (Colo. App. 1992)—30:9
- Quigley v. Rosenthal, 327 F.3d 1044 (10th Cir. 2003)—28:1
- Quintana v. Kudrna, 157 Colo. 421, 402 P.2d 927 (1965)—3:9
- Quist v. Specialties Supply Co., Inc., 12 P.3d 863 (Colo. App. 2000)—6:14
- Qwest Services Corp. v. Blood, 252 P.3d 1071 (Colo. 2011)—1:11, 5:4

## R

- Radetsky v. Leonard, 145 Colo. 358, 358 P.2d 1014 (1961)—11:4

- Radiology Professional Corp. v. Trinidad Area Health Ass'n, Inc., 195 Colo. 253, 577 P.2d 748 (1978)—24:1
- Rains v. Barber, 2018 CO 61, 420 P.3d 969 (Colo. 2018)—9:1, 9:19
- Rains v. Foundation Health Systems Life & Health, 23 P.3d 1249 (Colo. App. 2001)—30:7
- Raleigh v. Performance Plumbing and Heating, 130 P.3d 1011 (Colo. 2006)—8:8, 8:22, 9:1
- Ralston, In re Estate of, 674 P.2d 1001 (Colo. App. 1983)—34:8
- Ramstetter, In re Estate of, 2016 COA 81, 411 P.3d 1043 (Colo. App. 2016)—3:9
- Randall & Blake, Inc. v. Metro Wastewater Reclamation Dist., 77 P.3d 804 (Colo. App. 2003)—30:32
- Ranta Const., Inc. v. Anderson, 190 P.3d 835, 66 U.C.C. Rep. Serv. 2d 200 (Colo. App. 2008)—30:14, 30:16
- Rantz v. Kaufman, 109 P.3d 132 (Colo. 2005)—15:18, 15:19
- R.A. Reither Const., Inc. v. Wheatland Rural Elec. Ass'n, 680 P.2d 1342, 38 U.C.C. Rep. Serv. 420 (Colo. App. 1984)—30:28
- Rasmussen v. State Nat. Bank, 11 Colo. 301, 18 P. 28 (1888)—30:7
- Ravenstar, LLC v. One Ski Hill Place, LLC, 2017 CO 83, 401 P.3d 552 (Colo. 2017)—30:40
- Ravin v. Gambrell By and Through Eddy, 788 P.2d 817 (Colo. 1990)—9:17
- Razi v. Schmitt, 36 P.3d 102 (Colo. App. 2001)—5:4, 18:4
- Real Equity Diversification, Inc. v. Coville, 744 P.2d 756 (Colo. App. 1987)—8:1, 30:56
- Realty Development Co. v. Feit, 154 Colo. 44, 387 P.2d 898 (1963)—7:4
- Reaves v. Horton, 33 Colo. App. 186, 518 P.2d 1380 (App. 1973)—9:18
- Rector v. City and County of Denver, 122 P.3d 1010 (Colo. App. 2005)—29:1
- Redden v. SCI Colorado Funeral Services, Inc., 38 P.3d 75 (Colo. 2001)—4:20, 9:24, 9:29, 15:1, 15:2, 15:21
- Reed v. Barlow, 153 Colo. 451, 386 P.2d 979 (1963)—9:14
- Rees v. Unleaded Software, Inc., 2013 COA 164, 383 P.3d 20 (Colo. App. 2013)—29:4
- Regents of University of Colorado ex rel. University of Colorado at Boulder v. Harbert Const. Co., 51 P.3d 1037, 168 Ed. Law Rep. 503 (Colo. App. 2001)—9:13
- Regional Transp. Dist. v. Lopez, 916 P.2d 1187 (Colo. 1996)—12:15
- Regional Transportation District v. 750 West 48th Ave., LLC, 2015 CO 57, 357 P.3d 179 (Colo. 2015)—36:1
- Rego Co. v. McKown-Katy, 801 P.2d 536 (Colo. 1990)—6:10
- Reid v. Berkowitz, 2016 COA 28, 370 P.3d 644 (Colo. App. 2016)—8:18, 12:2, 12:3
- Reid v. Berkowitz, 2013 COA 110M, 315 P.3d 185 (Colo. App. 2013)—9:6, 9:22, 9:24, 9:28, 9:29, 12:1, 12:2, 12:3
- Reigel v. SavaSeniorCare L.L.C., 292 P.3d 977 (Colo. App. 2011)—9:18, 10:3, 15:1, 23:1, 23:2
- Re/Max Suburban, Inc. v. Widener, 633 P.2d 530 (Colo. App. 1981)—30:56

## TABLE OF CASES

- Remley v. Newton, 147 Colo. 401, 364 P.2d 581 (1961)—9:12
- Renell v. Argonaut Liquor Co., 148 Colo. 154, 365 P.2d 239 (1961)—11:6
- Renfandt v. New York Life Insurance Company, 2018 CO 49, 419 P.3d 576 (Colo. 2018)—30:33
- Rentfro's Estate, In re, 102 Colo. 400, 79 P.2d 1042 (1938)—34:15
- Republican Pub. Co. v. Conroy, 5 Colo. App. 262, 38 P. 423 (1894)—22:25
- Republican Pub. Co. v. Miner, 12 Colo. 77, 20 P. 345 (1888)—22:16, 22:26
- Republican Pub. Co. v. Mosman, 15 Colo. 399, 24 P. 1051 (1890)—22:8, 22:25, 22:26
- Resolution Trust Corp. v. Heiserman, 898 P.2d 1049 (Colo. 1995)—27:1
- Reyher v. State Farm Mut. Auto. Ins. Co., 171 P.3d 1263 (Colo. App. 2007)—25:6
- Reynolds v. Armstead, 166 Colo. 372, 443 P.2d 990 (1968)—30:12, 30:46
- Reynolds v. State Bd. for Community Colleges and Occupational Educ., 937 P.2d 774, 118 Ed. Law Rep. 780 (Colo. App. 1996)—12:15
- R. F. Carle Co. v. Biological Sciences Curriculum Study Co., 616 P.2d 989 (Colo. App. 1980)—30:12
- Rhea v. Green, 29 Colo. App. 19, 476 P.2d 760, 51 A.L.R.3d 1222 (App. 1970)—9:1
- Rhino Fund, LLLP v. Hutchins, 215 P.3d 1186 (Colo. App. 2008)—32:4
- Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc., 62 P.3d 142 (Colo. 2003)—29:1, 29:2, 29:3, 29:4
- Rhodig v. Cummings, 160 Colo. 499, 418 P.2d 521 (1966)—11:12
- Rian v. Imperial Mun. Services Group, Inc., 768 P.2d 1260 (Colo. App. 1988)—15:25, 15:26
- Riccatone v. Colorado Choice Health Plans, 2013 COA 133, 315 P.3d 203 (Colo. App. 2013)—25:2
- Richardson v. El Paso Consol. Gold Min. Co., 51 Colo. 440, 118 P. 982 (1911)—9:8
- Richardson v. People, 2020 CO 46, 481 P.3d 1 (Colo. 2020)—1:2
- Richardson ex rel. Richardson v. Starks, 36 P.3d 168, 160 Ed. Law Rep. 267 (Colo. App. 2001)—12:15
- Richmond v. Grabowski, 781 P.2d 192 (Colo. App. 1989)—30:25
- Ricklin v. Smith, 670 P.2d 1239 (Colo. App. 1983)—2:6, 9:6, 9:22
- Ridenour v. Diffie, 133 Colo. 467, 297 P.2d 280 (1956)—11:1, 11:4, 11:9
- Rieger v. Wat Buddhawararam of Denver, Inc., 2013 COA 156, 338 P.3d 404 (Colo. App. 2013)—9:1, 12:2, 12:3
- Rifle Production Credit Ass'n v. Wagner, 543 P.2d 91 (Colo. App. 1975)—32:2
- Riggs v. McMurtry, 157 Colo. 33, 400 P.2d 916 (1965)—5:6, 30:41
- Rigot v. Conda, 134 Colo. 375, 304 P.2d 629 (1956)—10:4
- Ringsby v. Timpte, 105 Colo. 356, 98 P.2d 287 (1939)—19:10
- Ringsby Truck Lines, Inc. v. Bradfield, 193 Colo. 151, 563 P.2d 939 (1977)—9:22, 11:11
- Rinker v. Colina-Lee, 2019 COA 45, 452 P.3d 161 (Colo. App. 2019)—18:4
- Rinnander v. Denver Milk Producers, 114 Colo. 506, 166 P.2d 984 (1946)—24:1, 24:2

- Rio Grande Southern R. Co. v. Nichols, 52 Colo. 300, 123 P. 318 (1912)—5:5
- Riverside, County of v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991)—21:19
- RMB Services, Inc. v. Truhlar, 151 P.3d 673 (Colo. App. 2006)—15:1, 15:21
- Roa v. Miller, 784 P.2d 826 (Colo. App. 1989)—29:5
- Robbins, In re Marriage of, 8 P.3d 625 (Colo. App. 2000)—8:1, 8:12
- Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371 (Colo. 1997)—28:1, 28:5, 28:6, 28:8, 28:9, 28:11
- Robert E. Lee Silver Min. Co. v. Omaha & Grant Smelting & Refining Co., 16 Colo. 118, 26 P. 326 (1891)—30:3
- Robert K. Schader, P.C. v. Etta Industries, Inc., 892 P.2d 363 (Colo. App. 1994)—19:1
- Roberts v. Fisher, 169 Colo. 288, 455 P.2d 871 (1969)—9:9, 9:22
- Roberts v. Lehl, 27 Colo. App. 351, 149 P. 851 (1915)—18:4
- Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (App. 1978)—14:3, 14:25
- Robinson v. Colorado State Lottery Div., 155 P.3d 409 (Colo. App. 2006)—12:15
- Robinson v. Kerr, 144 Colo. 48, 355 P.2d 117, 88 A.L.R.2d 705 (1960)—13:1
- Robinson v. Legro, 2014 CO 40, 325 P.3d 1053 (Colo. 2014)—13:3
- Robinson v. Poudre Valley Federal Credit Union, 654 P.2d 861 (Colo. App. 1982)—9:4, 9:5
- Robinson, In re Marriage of, 43 Colo. App. 171, 601 P.2d 358 (App. 1979)—7:2
- Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP, 2018 CO 54, 420 P.3d 223 (Colo. 2018)—7:4, 8:2, 8:3, 19:1, 19:2, 19:5, 26:2
- Rocky Mountain Festivals, Inc. v. Parsons Corp., 242 P.3d 1067 (Colo. 2010)—5:7, 24:7
- Rocky Mountain Hosp. and Medical Service v. Mariani, 916 P.2d 519, 52 A.L.R.5th 857 (Colo. 1996)—31:12
- Rocky Mountain News Printing Co. v. Fridborn, 46 Colo. 440, 104 P. 956 (1909)—22:10, 22:26
- Rocky Mountain Planned Parenthood, Inc. v. Wagner, 2020 CO 51, 467 P.3d 287 (Colo. 2020)—9:1
- Rocky Mountain Rhino Lining, Inc. v. Rhino Linings USA, Inc., 37 P.3d 458 (Colo. App. 2001)—30:39
- Rodrigue v. Hausman, 33 Colo. App. 305, 519 P.2d 1216 (App. 1974)—2:1, 6:1, 22:25, 23:6, 25:9, 26:5, 30:37, 31:7, 31:15
- Rodriguez v. Morgan County R.E.A., Inc., 878 P.2d 77 (Colo. App. 1994)—9:6
- Rogers v. Board of Trustees of Town of Fraser, 859 P.2d 284 (Colo. App. 1993)—31:7
- Rogers v. Funkhouser, 121 Colo. 13, 212 P.2d 497 (1949)—6:13
- Roget v. Grand Pontiac, Inc., 5 P.3d 341 (Colo. App. 1999)—23:1, 23:2
- Rohauer v. Little, 736 P.2d 403 (Colo. 1987)—8:1, 30:12, 30:40
- Rojas v. Engineered Plastic Designs, Inc., 68 P.3d 591 (Colo. App. 2003)—9:1, 23:1

## TABLE OF CASES

- Romero v. Parker, 619 P.2d 89 (Colo. App. 1980)—6:9
- Romero, In re Estate of, 126 P.3d 228 (Colo. App. 2005)—34:11, 34:12, 34:16
- Rooftop Restoration, Inc. v. American Family Mutual Insurance Company, 2018 CO 44, 418 P.3d 1173 (Colo. 2018)—25:10
- Roper v. Spring Lake Development Co., 789 P.2d 483 (Colo. App. 1990)—30:55
- Rosales v. City and County of Denver, 89 P.3d 507 (Colo. App. 2004)—12:15
- Rose v. City and County of Denver, 990 P.2d 1120 (Colo. App. 1999)—21:1, 21:11, 21:13
- Rosenberg v. Grady, 843 P.2d 25 (Colo. App. 1992)—15:21
- Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971)—22:1, 22:3
- Rosen Novak Auto Co. v. Hartog, 168 Colo. 536, 454 P.2d 932 (1969)—32:3
- Rosenthal v. Whitehead, 171 Colo. 347, 467 P.2d 831 (1970)—32:3
- Rosenthal v. Whitehead, 159 Colo. 565, 413 P.2d 909 (1966)—32:2
- Ross v. Douglas, 470 P.2d 900 (Colo. App. 1970)—11:15, 11:16
- Rowe v. Metz, 195 Colo. 424, 579 P.2d 83 (1978)—22:27
- Rowell v. Clifford, 976 P.2d 363 (Colo. App. 1998)—10:3
- Rubenstein v. South Denver Nat. Bank, 762 P.2d 755 (Colo. App. 1988)—23:2, 26:1, 26:2, 26:3, 34:18
- Rucker v. Federal National Mortgage Association, 2016 COA 114, 410 P.3d 675 (Colo. App. 2016)—12:1, 12:3
- Ruff v. Yuma County Transp. Co., 690 P.2d 1296 (Colo. App. 1984)—30:23
- Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970)—23:1, 23:2, 23:4, 28:1, 28:2
- Ruiz v. ExCello Corp., 653 P.2d 415 (Colo. App. 1982)—14:1
- Rupert v. Clayton Brokerage Co. of St. Louis, Inc., 737 P.2d 1106 (Colo. 1987)—26:1, 26:5
- Rusch v. Lincoln-Devore Testing Laboratory, Inc., 698 P.2d 832 (Colo. App. 1984)—6:14, 30:54
- Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe, 107 P.3d 402 (Colo. App. 2004)—8:1, 8:12
- Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 122 S. Ct. 2151, 153 L. Ed. 2d 375 (2002)—25:2
- Russell v. Daniels, 5 Colo. App. 224, 37 P. 726 (1894)—30:7
- Russell v. First Am. Mortg. Co., 39 Colo. App. 360, 565 P.2d 972 (App. 1977)—8:11, 8:12, 19:17
- Russell v. McMillen, 685 P.2d 255 (Colo. App. 1984)—22:23
- Russo v. Birrenkott, 770 P.2d 1335 (Colo. App. 1988)—6:1, 9:14, 12:16
- Ruth v. Department of Highways, 145 Colo. 546, 359 P.2d 1033 (1961)—36:6
- Ryan v. School Dist. No. 2, Delta County, 68 Colo. 370, 189 P. 782 (1920)—31:7
- Ryan Gulch Reservoir Co. v. Swartz, 83 Colo. 225, 263 P. 728 (1928)—3:15, 9:20

Ryder v. Mitchell, 54 P.3d 885 (Colo. 2002)—9:1  
 Rylands v. Fletcher, L.R. 3 H.L. 330 (1868)—9:7A  
 Ryser v. Shelter Mutual Insurance Company, 2019 COA 88, 2019 WL 2454861 (Colo. App. 2019)—25:2  
 Rywalt v. Writer Corp., 34 Colo. App. 334, 526 P.2d 316 (App. 1974)—24:7

**S**

Safari 300, Ltd. v. Hamilton Family Enterprises, Inc., 181 P.3d 278 (Colo. App. 2007)—12:15  
 Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975)—1:2  
 Safeway Stores, Inc. v. Rees, 152 Colo. 318, 381 P.2d 999 (1963)—3:4, 14:20  
 Safeway Stores, Inc. v. Smith, 658 P.2d 255 (Colo. 1983)—12:6  
 Saint John's Church in Wilderness v. Scott, 194 P.3d 475 (Colo. App. 2008)—27:1  
 Salazar v. American Sterilizer Co., 5 P.3d 357 (Colo. App. 2000)—6:1  
 Salazar v. City of Sheridan, 44 Colo. App. 443, 618 P.2d 708 (App. 1980)—12:6  
 Salazar v. Webb, 44 Colo. App. 429, 618 P.2d 706 (App. 1980)—12:6  
 Salomon v. Webster, 4 Colo. 353, 1878 WL 281 (1878)—30:6  
 Salstrom v. Starke, 670 P.2d 809 (Colo. App. 1983)—17:10  
 Sams Automatic Car-Coupler Co. v. League, 25 Colo. 129, 54 P. 642 (1898)—3:1  
 Sancetta v. Apollo Stereo Music Co., Inc., 44 Colo. App. 292, 616 P.2d 182 (App. 1980)—17:1, 17:5  
 Sanchez v. Staats, 34 Colo. App. 243, 526 P.2d 672 (App. 1974)—9:14, 11:10  
 Sanderson v. American Family Mut. Ins. Co., 251 P.3d 1213 (Colo. App. 2010)—25:2, 25:3, 25:5  
 Sanderson v. Heath Mesa Homeowners Ass'n, 183 P.3d 679 (Colo. App. 2008)—18:1, 18:4  
 Sandoval v. Bix, 767 P.2d 759 (Colo. App. 1988)—13:1  
 Sandstead-Corona v. Sandstead, 2018 CO 26, 415 P.3d 310 (Colo. 2018)—34:1  
 Sandstead, In re Estate of, 2016 COA 49, 412 P.3d 799 (Colo. App. 2016)—8:9, 34:8  
 Sanford v. Kobey Bros. Const. Corp., 689 P.2d 724 (Colo. App. 1984)—8:22, 30:49  
 Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)—41:1  
 Sargent v. Crandall, 143 Colo. 199, 352 P.2d 676 (1960)—30:7  
 S.A.S. v. District Court In and For Jefferson County, 623 P.2d 58 (Colo. 1981)—40:1  
 Savage v. Pelton, 1 Colo. App. 148, 27 P. 948 (1891)—8:9, 8:10, 8:11  
 Saxonia Min. & Reduction Co. v. Cook, 7 Colo. 569, 4 P. 1111 (1884)—5:2, 30:13, 31:1, 31:3, 31:7  
 Schafer v. Hoffman, 831 P.2d 897 (Colo. 1992)—6:7

## TABLE OF CASES

- Scharrel v. Wal-Mart Stores, Inc., 949 P.2d 89 (Colo. App. 1997)—6:1, 9:2, 9:20, 9:21
- Schell v. Navajo Freight Lines, Inc., 693 P.2d 382 (Colo. App. 1984)—6:6, 8:18
- Schenck v. Minolta Office Systems, Inc., 802 P.2d 1131 (Colo. App. 1990)—17:1
- Schlagel, In re Estate of, 89 P.3d 419 (Colo. App. 2003)—34:16
- Schlessinger v. Schlessinger By and Through Schlessinger, 796 P.2d 1385 (Colo. 1990)—9:1
- Schlittenhardt v. Bernasky, 147 Colo. 601, 364 P.2d 586 (1961)—32:2
- Schlitters v. State, 787 P.2d 656 (Colo. App. 1989)—12:15
- Schmidt v. Cowen Transfer & Storage Co., 170 Colo. 550, 463 P.2d 445 (1970)—32:1
- Schmidt v. Frankewich, 819 P.2d 1074 (Colo. App. 1991)—15:18
- Schmutz v. Bolles, 800 P.2d 1307 (Colo. 1990)—14:27
- Schneider v. Midtown Motor Co., 854 P.2d 1322 (Colo. App. 1992)—9:14, 27:1, 27:2
- Schneiker v. Gordon, 732 P.2d 603 (Colo. 1987)—5:2
- Schnell v. Gustafson, 638 P.2d 850 (Colo. App. 1981)—19:1, 19:2
- Schollay v. Moffitt-West Drug Co., 17 Colo. App. 126, 67 P. 182 (1901)—8:15
- Scholz v. Metropolitan Pathologists, P.C., 851 P.2d 901 (Colo. 1993)—15:14
- School Dist. No. 1, City and County of Denver v. Cornish, 58 P.3d 1091, 171 Ed. Law Rep. 1028 (Colo. App. 2002)—31:6
- School Dist. No. 3 in Clear Creek County v. Nash, 27 Colo. App. 551, 140 P. 473 (1914)—31:7
- School District No. 1 in County of Denver v. Denver Classroom Teachers Association, 2019 CO 5, 433 P.3d 38, 362 Ed. Law Rep. 659 (Colo. 2019)—30:30
- Schreiber v. Burton, 81 Colo. 370, 256 P. 1 (1927)—27:2
- Schtul v. Wilson, 83 Colo. 528, 266 P. 1112 (1928)—19:10
- Schuessler v. Wolter, 2012 COA 86, 310 P.3d 151 (Colo. App. 2012)—5:6, 6:14, 15:4, 25:3, 25:9
- Schultz v. Boston Stanton, 198 P.3d 1253 (Colo. App. 2008)—15:18
- Schultz v. GEICO Casualty Company, 2018 CO 87, 429 P.3d 844 (Colo. 2018)—25:2
- Schumacher, In re Estate of, 253 P.3d 1280 (Colo. App. 2011)—34:2, 34:8, 34:9
- Schur v. Storage Technology Corp., 878 P.2d 51 (Colo. App. 1994)—31:4, 31:5
- Schwankl v. Davis, 85 P.3d 512 (Colo. 2004)—22:18
- Scognamillo v. Olsen, 795 P.2d 1357 (Colo. App. 1990)—15:24, 15:25
- Scott v. City of Greeley, 931 P.2d 525 (Colo. App. 1996)—12:15
- Scott v. Leonard, 117 Colo. 54, 184 P.2d 138 (1947)—34:14, 34:15
- Scott v. Matlack, Inc., 39 P.3d 1160 (Colo. 2002)—9:1, 9:6, 9:14
- Scott v. People, 166 Colo. 432, 444 P.2d 388 (1968)—21:13
- Scott v. Scott, 2018 COA 25, 428 P.3d 626 (Colo. App. 2018)—32:1, 32:4
- Scott v. Silver Creek Ski Corp., 767 P.2d 806 (Colo. App. 1988)—3:6

- Scott, In re Estate of, 119 P.3d 511 (Colo. App. 2004)—34:11
- Scott R. Larson, P.C. v. Grinnan, 2017 COA 85, 2017 WL 2590525 (Colo. App. 2017)—7:4
- Scott Wetzel Services, Inc. v. Johnson, 821 P.2d 804 (Colo. 1991)—25:2, 25:8
- Scoular Co. v. Denney, 151 P.3d 615, 62 U.C.C. Rep. Serv. 2d 262 (Colo. App. 2006)—30:3, 30:4, 30:6
- Seago v. Fellet, 676 P.2d 1224 (Colo. App. 1983)—30:23, 30:49
- Seal v. Hart, 755 P.2d 462 (Colo. App. 1988)—5:4, 19:14
- Seal v. Lemmel, 140 Colo. 387, 344 P.2d 694 (1959)—7:5
- Seale v. Bates, 145 Colo. 430, 359 P.2d 356 (1961)—30:25
- Sears v. Hicklin, 13 Colo. 143, 21 P. 1022 (1889)—19:7, 19:10, 30:18
- Seaward Const. Co., Inc. v. Bradley, 817 P.2d 971 (Colo. 1991)—5:4
- Seder v. City of Ft. Collins, 987 P.2d 904 (Colo. App. 1999)—12:15
- Seefried v. Hummel, 148 P.3d 184 (Colo. App. 2005)—22:12, 23:1
- Seeley v. Board of County Com'rs for La Plata County, 791 P.2d 696 (Colo. 1990)—31:4
- Sego v. Mains, 41 Colo. App. 1, 578 P.2d 1069 (App. 1978)—9:14
- Seible v. Denver Post Corp., 782 P.2d 805 (Colo. App. 1989)—22:1, 22:3
- Sellar v. Clelland, 2 Colo. 532, 1875 WL 310 (1875)—19:1, 19:10, 19:16, 19:17
- Semler v. Hellerstein, 2016 COA 143, 428 P.3d 555 (Colo. App. 2016)—9:1, 15:18, 26:2, 27:1
- Settle v. Basinger, 2013 COA 18, 411 P.3d 717 (Colo. App. 2013)—8:6, 8:7, 9:1, 15:1
- Sewell v. Public Service Co. of Colorado, 832 P.2d 994 (Colo. App. 1991)—9:1, 9:20, 9:21
- SG Interests I, Ltd. v. Kolbensschlag, 2019 COA 115, 452 P.3d 1 (Colo. App. 2019)—22:16
- S.G.L., People ex rel., 214 P.3d 580 (Colo. App. 2009)—41:7
- Shands v. Wm. R. Winton, Ltd., 91 P.3d 416 (Colo. App. 2003)—30:56
- Shannon v. Colorado School of Mines, 847 P.2d 210, 81 Ed. Law Rep. 566 (Colo. App. 1992)—31:7
- Sharp v. Kaiser Foundation Health Plan of Colorado, 710 P.2d 1153 (Colo. App. 1985)—9:18, 15:1
- Shaw v. General Motors Corp., 727 P.2d 387, 1 U.C.C. Rep. Serv. 2d 76 (Colo. App. 1986)—14:1, 14:3, 14:9, 14:10, 14:17, 14:22
- Shaw v. Sargent School Dist. No. RE-33-J ex rel. Bd. of Educ., 21 P.3d 446, 152 Ed. Law Rep. 780 (Colo. App. 2001)—31:4
- Shaw Const., LLC v. United Builder Services, Inc., 2012 COA 24, 296 P.3d 145 (Colo. App. 2012)—9:1
- Shean v. Farmers Ins. Exchange, 934 P.2d 835 (Colo. App. 1996)—30:16
- Sheffield Services Co. v. Trowbridge, 211 P.3d 714 (Colo. App. 2009)—3:7, 9:4
- Shekarchian v. Maxx Auto Recovery, Inc., 2019 COA 60, 2019 WL 1830337 (Colo. App. 2019)—29:4
- Shell's Estate, In re, 28 Colo. 167, 63 P. 413 (1900)—34:14, 34:15
- Shelter Mut. Ins. Co. v. Breit, 908 P.2d 1149 (Colo. App. 1995)—30:16
- Shelton v. Penrose-St. Francis Healthcare System, 968 P.2d 132 (Colo. App. 1998)—9:17

## TABLE OF CASES

- Shelton v. Penrose/St. Francis Healthcare System, 984 P.2d 623 (Colo. 1999)—15:1
- Sherman Agency v. Carey, 195 Colo. 277, 577 P.2d 759 (1978)—30:35, 30:56
- Sheron v. Lutheran Medical Center, 18 P.3d 796 (Colo. App. 2000)—9:22, 15:1, 15:6, 15:14
- Shiffers v. Cunningham Shepherd Builders Co., 28 Colo. App. 29, 470 P.2d 593 (App. 1970)—30:55
- Shirley v. Merritt, 147 Colo. 301, 364 P.2d 192 (1961)—19:17
- Shockley v. Wigton, 490 P.2d 77 (Colo. App. 1971)—32:2
- Shoen v. Shoen, 2012 COA 207, 292 P.3d 1224 (Colo. App. 2012)—22:1, 22:13
- Shook v. Pitkin County Board of County Commissioners, 2015 COA 84, 411 P.3d 158 (Colo. App. 2015)—3:8
- Short v. Downs, 36 Colo. App. 109, 537 P.2d 754 (App. 1975)—6:1, 15:2, 15:10
- Short v. Kinkade, 685 P.2d 210 (Colo. App. 1983)—15:2, 15:3
- Shotkoski v. Denver Investment Group Inc., 134 P.3d 513 (Colo. App. 2006)—29:1
- Showpiece Homes Corp. v. Assurance Co. of America, 38 P.3d 47 (Colo. 2001)—25:9, 29:1, 29:2
- Shriners Hosp. for Crippled Children, Inc. v. Southard, 892 P.2d 417 (Colo. App. 1994)—15:18
- Shriver v. Carter, 651 P.2d 436 (Colo. App. 1982)—8:1
- Shultz v. Linden-Alimak, Inc., 734 P.2d 146, 3 U.C.C. Rep. Serv. 2d 1385 (Colo. App. 1986)—14:7, 14:8, 14:27
- Shutt v. Kaufman's, Inc., 165 Colo. 175, 438 P.2d 501 (1968)—9:17
- Siener v. Zeff, 194 P.3d 467 (Colo. App. 2008)—8:9, 8:14
- Sigel-Campion Live Stock Commission Co. v. Ardohain, 71 Colo. 410, 207 P. 82 (1922)—8:12
- Sigel-Campion Live Stock Com'n Co. v. Holly, 44 Colo. 580, 101 P. 68 (1909)—32:1, 32:3
- Sigrist v. Century 21 Corp., 519 P.2d 362 (Colo. App. 1973)—30:4
- Silva v. Basin Western, Inc., 47 P.3d 1184 (Colo. 2002)—25:1
- Silva v. Wilcox, 223 P.3d 127 (Colo. App. 2009)—6:1, 9:14
- Silver v. Colorado Cas. Ins. Co., 219 P.3d 324 (Colo. App. 2009)—30:18
- Silverton, Town of v. Phoenix Heat Source System, Inc., 948 P.2d 9 (Colo. App. 1997)—14:30, 30:34
- Simkins v. Dowis, 100 Colo. 355, 67 P.2d 627 (1937)—9:9
- Simmons v. Simmons, 773 P.2d 602 (Colo. App. 1988)—23:1
- Simon v. Coppola, 876 P.2d 10 (Colo. App. 1993)—14:1, 14:13
- Simon v. Shelter General Ins. Co., 842 P.2d 236 (Colo. 1992)—30:16
- Simpson v. Darwin Lee Stjernholm, D.C., 985 P.2d 31 (Colo. App. 1998)—4:4
- Sims v. Sperry, 835 P.2d 565 (Colo. App. 1992)—30:18
- Sinclair Transp. Co. v. Sandberg, 228 P.3d 198 (Colo. App. 2009)—36:8
- Sinclair Transportation Company v. Sandberg, 2014 COA 76M, 350 P.3d 924 (Colo. App. 2014)—30:16
- Singleton v. Collins, 40 Colo. App. 340, 574 P.2d 882 (App. 1978)—9:14, 9:16

- Sipes v. Sipes, 87 Colo. 301, 287 P. 284 (1930)—30:21
- Sisneros v. District Court In and For Tenth Judicial Dist., 199 Colo. 179, 606 P.2d 55 (1980)—35:1
- Sisters of Charity of Cincinnati, Ohio v. Burke, 22 Colo. App. 230, 124 P. 472 (1912)—30:47
- S K Peightal Engineers, LTD v. Mid Valley Real Estate Solutions V, LLC, 2015 CO 7, 342 P.3d 868 (Colo. 2015)—9:1
- Sky Dancer, In re Estate of, 13 P.3d 1231 (Colo. App. 2000)—34:1, 34:2, 34:6
- Sky Fun 1 v. Schuttloffel, 27 P.3d 361 (Colo. 2001)—5:4
- Sky Fun 1, Inc. v. Schuttloffel, 8 P.3d 570 (Colo. App. 2000)—22:1
- Slack v. Farmers Ins. Exchange, 5 P.3d 280 (Colo. 2000)—4:20, 9:28, 15:2, 23:6, 25:9
- Slack v. Sodal, 190 Colo. 411, 547 P.2d 923 (1976)—19:17
- Slaughter v. John Elway Dodge Southwest/AutoNation, 107 P.3d 1165 (Colo. App. 2005)—31:12
- Slee v. Simpson, 91 Colo. 461, 15 P.2d 1084, 85 A.L.R. 412 (1932)—17:1
- Sleeping Indian Ranch, Inc. v. West Ridge Group, LLC, 119 P.3d 1062 (Colo. 2005)—7:4
- Slide Mines v. Denver Equipment Co., 112 Colo. 285, 148 P.2d 1009 (1944)—19:17
- Sloat v. Matheny, 625 P.2d 1031 (Colo. 1981)—30:54, 30:55
- Slovak v. Board of County Com'rs of Weld County, 697 P.2d 781 (Colo. App. 1984)—9:2
- Smartt v. Lamar Oil Co., 623 P.2d 73 (Colo. App. 1980)—6:8, 6:9
- Smiley's Too, Inc. v. Denver Post Corp., 935 P.2d 39 (Colo. App. 1996)—22:1, 22:13, 22:16
- Smit v. Anderson, 72 P.3d 369 (Colo. App. 2002)—9:14
- Smith v. Board of Educ. of School Dist. Fremont RE-1, 83 P.3d 1157, 185 Ed. Law Rep. 362 (Colo. App. 2003)—23:2
- Smith v. Clifton Sanitation Dist., 134 Colo. 116, 300 P.2d 548 (1956)—36:3, 36:6
- Smith v. Curran, 28 Colo. App. 358, 472 P.2d 769 (App. 1970)—9:17, 15:1
- Smith v. Daily Mail Pub. Co., 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979)—28:5
- Smith v. District Court In and For Fourth Judicial Dist., 907 P.2d 611 (Colo. 1995)—1:3
- Smith v. Eichheim, 147 Colo. 180, 363 P.2d 185 (1961)—18:4
- Smith v. Town of Estes Park, 944 P.2d 571 (Colo. App. 1996)—12:15
- Smith v. Farmers Ins. Exchange, 9 P.3d 335 (Colo. 2000)—30:38
- Smith v. Hensley, 107 Colo. 180, 109 P.2d 909 (1941)—17:7
- Smith v. Home Light and Power Co., 734 P.2d 1051 (Colo. 1987)—9:7, 14:1
- Smith v. Hoyer, 697 P.2d 761 (Colo. App. 1984)—30:38
- Smith v. Huber, 666 P.2d 1122 (Colo. App. 1983)—30:18
- Smith v. Jeppsen, 2012 CO 32, 277 P.3d 224 (Colo. 2012)—6:1, 10:3
- Smith v. Kinningham, 2013 COA 103, 328 P.3d 258 (Colo. App. 2013)—6:1

## TABLE OF CASES

- Smith v. Long, 40 Colo. App. 531, 578 P.2d 232 (App. 1978)—30:31
- Smith v. Mehaffy, 30 P.3d 727 (Colo. App. 2000)—8:1, 15:18, 15:24
- Smith v. Russell, 20 Colo. App. 554, 80 P. 474 (1905)—30:4
- Smith v. Town of Snowmass Village, 919 P.2d 868 (Colo. App. 1996)—12:15
- Smith v. State Compensation Ins. Fund, 749 P.2d 462 (Colo. App. 1987)—9:18, 9:20, 9:21
- Smith v. State Farm Mutual Automobile Insurance Company, 2017 COA 6, 399 P.3d 771 (Colo. App. 2017)—30:33
- Smith v. TCI Communications, Inc., 981 P.2d 690 (Colo. App. 1999)—26:3, 30:9
- Smith v. Vincent, 77 P.3d 927 (Colo. App. 2003)—10:3
- Smith v. Zufelt, 880 P.2d 1178 (Colo. 1994)—4:20, 6:1, 9:28
- Smith, for and on Behalf of Leech v. Mills, 123 Colo. 11, 225 P.2d 483 (1950)—30:10, 30:11
- Smokebrush Foundation v. City of Colorado Springs, 2018 CO 10, 410 P.3d 1236 (Colo. 2018)—12:15, 18:1
- Snodgrass v. Smith, 42 Colo. 60, 94 P. 312 (1908)—34:14, 34:15
- Snow v. Birt, 968 P.2d 177 (Colo. App. 1998)—9:1, 13:1
- Snow Basin, Ltd. v. Boettcher & Co., Inc., 805 P.2d 1151 (Colo. App. 1990)—31:4, 31:11
- Snyder v. Jefferson County School Dist. R-1, 842 P.2d 624, 79 Ed. Law Rep. 632 (Colo. 1992)—31:6
- Sodal v. French, 35 Colo. App. 16, 531 P.2d 972 (App. 1974)—19:1
- Soderlun v. Public Service Co. of Colorado, 944 P.2d 616 (Colo. App. 1997)—30:16, 31:4
- Soicher v. State Farm Mutual Automobile Insurance Company, 2015 COA 46, 351 P.3d 559 (Colo. App. 2015)—25:2
- Solano v. Goff, 985 P.2d 53 (Colo. App. 1999)—9:1
- Soneff v. Harlan, 712 P.2d 1084 (Colo. App. 1985)—19:1
- Songer v. Bowman, 804 P.2d 261 (Colo. App. 1990)—15:3, 15:6
- Sonoco Products Co. v. Johnson, 23 P.3d 1287 (Colo. App. 2001)—5:1
- Sorenson v. Connelly, 36 Colo. App. 168, 536 P.2d 328 (App. 1975)—30:43
- Sos v. Roaring Fork Transportation Authority, 2017 COA 142, 2017 WL 5493526 (Colo. App. 2017)—36:1, 36:2, 36:5
- Sours v. Goodrich, 674 P.2d 995 (Colo. App. 1983)—6:1
- Southerland v. Argonaut Ins. Co., 794 P.2d 1102 (Colo. App. 1990)—25:2
- South Park Aggregates, Inc. v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 847 P.2d 218 (Colo. App. 1992)—5:4, 25:2, 25:9
- Spaur, 942 P.2d 1265—30:16
- Spaur v. Allstate Ins. Co., 942 P.2d 1261 (Colo. App. 1996)—30:16
- Spears Free Clinic & Hosp. for Poor Children v. Maier, 128 Colo. 263, 261 P.2d 489 (1953)—22:1, 22:24
- Spencer v. United Mortg. Co., 857 P.2d 1342 (Colo. App. 1993)—8:8, 23:1
- Spoor v. Serota, 852 P.2d 1292 (Colo. App. 1992)—9:17, 15:1, 15:2, 15:3
- Sposato v. Heggs, 123 Colo. 553, 233 P.2d 385 (1951)—19:17
- Springer v. City and County of Denver, 13 P.3d 794 (Colo. 2000)—8:5, 8:18, 8:19, 8:20, 8:21, 9:24, 9:28, 9:29, 12:2, 12:3, 12:15

- Sprung v. Adcock, 903 P.2d 1224 (Colo. App. 1995)—5:4, 6:1
- Stahl v. Cooper, 117 Colo. 468, 190 P.2d 891 (1948)—6:1
- Staley v. Security Athletic Ass'n, 152 Colo. 19, 380 P.2d 53 (1963)—12:4
- Stalos v. Booras, 34 Colo. App. 252, 528 P.2d 254 (App. 1974)—19:12
- St. Amant v. Thompson, 390 U.S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968)—22:3
- Stamp v. Rippe, 29 Colo. App. 185, 483 P.2d 420 (App. 1971)—19:17
- Stamp v. Vail Corp., 172 P.3d 437 (Colo. 2007)—6:3, 9:1, 10:3
- Stan Clauson Associates, Inc. v. Coleman Brothers Const., LLC, 2013 COA 7, 297 P.3d 1042 (Colo. App. 2013)—30:11, 30:12
- Stanley v. Adams County School Dist. 27J, 942 P.2d 1322, 120 Ed. Law Rep. 818 (Colo. App. 1997)—12:15
- Stanton v. Schultz, 222 P.3d 303 (Colo. 2010)—15:19
- Stark v. Poudre School Dist. R-1, 192 Colo. 396, 560 P.2d 77 (1977)—36:6
- State v. Mason, 724 P.2d 1289 (Colo. 1986)—9:1
- State v. Moldovan, 842 P.2d 220 (Colo. 1992)—9:1, 9:14, 12:15
- State v. Morison, 148 Colo. 79, 365 P.2d 266 (1961)—6:11
- State v. Nieto, 993 P.2d 493 (Colo. 2000)—12:15
- State Bank of Wiley v. States, 723 P.2d 159 (Colo. App. 1986)—19:12
- State Bd. of Medical Examiners v. McCroskey, 880 P.2d 1188 (Colo. 1994)—15:3
- State Dept. of Highways v. Mahaffey, 697 P.2d 773 (Colo. App. 1984)—36:1, 36:6, 36:7, 36:10
- State Dept. of Highways v. Woolley, 696 P.2d 828 (Colo. App. 1984)—30:7
- State Dept. of Highways, Division of Highways v. Copper Mountain, Inc., 624 P.2d 936 (Colo. App. 1981)—36:1
- State Dept. of Highways, Division of Highways v. Ogden, 638 P.2d 832 (Colo. App. 1981)—36:6
- State Dept. of Highways, Div. of Highways v. Pigg, 656 P.2d 46 (Colo. App. 1982)—36:1
- State Dept. of Highways, Div. of Highways v. Town of Silverthorne, 707 P.2d 1017 (Colo. App. 1985)—36:8
- State Dept. of Highways, Div. of Highways, State of Colo. v. Interstate-Denver West, 791 P.2d 1119 (Colo. 1990)—36:4
- State Farm Fire & Cas. Co. v. Nikitow, 924 P.2d 1084 (Colo. App. 1995)—30:9
- State Farm Fire and Cas. Co. v. Weiss, 194 P.3d 1063, 50 A.L.R.6th 593 (Colo. App. 2008)—15:18
- State Farm Mut. Auto. Ins. Co. v. Bencomo, 873 P.2d 47 (Colo. App. 1994)—30:35
- State Farm Mut. Auto. Ins. Co. v. Brekke, 105 P.3d 177 (Colo. 2004)—25:2, 25:8
- State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 60 Fed. R. Evid. Serv. 1349, 1 A.L.R. Fed. 2d 739 (2003)—5:4
- State Farm Mut. Auto. Ins. Co. v. Nissen, 851 P.2d 165 (Colo. 1993)—30:16

## TABLE OF CASES

- State Farm Mut. Auto. Ins. Co. v. Peiffer, 955 P.2d 1008 (Colo. 1998)—6:7, 25:9
- State Farm Mutual Automobile Insurance Company v. Fisher, 2018 CO 39, 418 P.3d 501 (Colo. 2018)—25:10
- State Farm Mutual Automobile Insurance Company v. Johnson, 2017 CO 68, 396 P.3d 651 (Colo. 2017)—8:9A, 8:9B, 8:10, 8:11, 8:12, 25:2
- States v. R.D. Werner Co., Inc., 799 P.2d 427 (Colo. App. 1990)—14:17, 14:27, 14:28, 14:29, 14:30, 14:30A
- Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862 (App. 1971)—15:10
- Stauffer v. Stegemann, 165 P.3d 713 (Colo. App. 2006)—27:1, 32:1
- Stavely v. Johnson, 157 Colo. 56, 400 P.2d 922 (1965)—30:56
- St. Clair v. Cash Gold Min. & Mill. Co., 9 Colo. App. 235, 47 P. 466 (1896)—18:4
- Steedle v. Sereff, 167 P.3d 135 (Colo. 2007)—10:3
- Steeves v. Smiley, 144 Colo. 5, 354 P.2d 1011 (1960)—9:30
- Stefanich v. Martinez, 39 Colo. App. 500, 570 P.2d 554 (App. 1977)—9:6, 9:31
- Steiger v. Burroughs, 878 P.2d 131 (Colo. App. 1994)—18:1, 34:18
- Steiner v. Minnesota Life Ins. Co., 85 P.3d 135 (Colo. 2004)—3:5A
- Stephen v. City and County of Denver, 659 P.2d 666 (Colo. 1983)—12:15
- Stephens v. Koch, 192 Colo. 531, 561 P.2d 333 (1977)—6:7, 6:8
- Sterenbuch v. Goss, 266 P.3d 428 (Colo. App. 2011)—5:6, 17:10
- Stevens v. Moore and Co. Realtor, 874 P.2d 495 (Colo. App. 1994)—5:7
- Stevens v. Strauss, 147 Colo. 547, 364 P.2d 382 (1961)—9:23, 10:4
- Steward Software Co., LLC v. Kopcho, 266 P.3d 1085 (Colo. 2011)—32:4
- Steward Software Co., LLC v. Kopcho, 275 P.3d 702 (Colo. App. 2010)—6:14
- Stewart v. Blanning, 677 P.2d 1382 (Colo. App. 1984)—6:14, 19:1, 30:18
- Stewart v. Breckenridge, 69 Colo. 108, 169 P. 543 (1917)—30:25
- Stewart v. Rice, 25 P.3d 1233 (Colo. App. 2000)—6:1, 6:2
- Stice v. Peterson, 144 Colo. 219, 355 P.2d 948 (1960)—30:1, 30:26
- St. Luke's Hospital v. Industrial Commission, 142 Colo. 28, 349 P.2d 995 (1960)—9:10
- Stocker v. Newcomb, 91 Colo. 479, 15 P.2d 975 (1932)—11:2
- Stockwell v. Regional Transp. Dist. of Denver, 946 P.2d 542 (Colo. App. 1997)—12:15
- Stokes v. Denver Newspaper Agency, LLP, 159 P.3d 691 (Colo. App. 2006)—8:8, 8:22
- Stone v. Caroselli, 653 P.2d 754 (Colo. App. 1982)—30:39
- Stone v. People, 174 Colo. 504, 485 P.2d 495 (1971)—21:11
- Stone v. Satriana, 41 P.3d 705 (Colo. 2002)—4:20, 5:2, 9:29, 15:18, 15:21
- Stone's Farm Supply, Inc. v. Deacon, 805 P.2d 1109 (Colo. 1991)—14:1, 14:8, 14:19
- Stortroen v. Beneficial Finance Co. of Colorado, 736 P.2d 391 (Colo. 1987)—8:1, 8:16, 30:4, 30:5
- Stout v. Denver Park & Amusement Co., 87 Colo. 294, 287 P. 650 (1930)—9:18, 9:21
- Stresscon Corporation v. Travelers Property Casualty Company of America, 2013 COA 131, 373 P.3d 615 (Colo. App. 2013)—6:1, 25:10

- Stroh v. American Recreation & Mobile Home Corp. of Colorado, 35 Colo. App. 196, 530 P.2d 989, 16 U.C.C. Rep. Serv. 726 (App. 1975)—30:10
- St. Vrain Valley School District RE-1J v. A.R.L. by and through Loveland, 2014 CO 33, 325 P.3d 1014, 305 Ed. Law Rep. 527 (Colo. 2014)—9:1, 12:15
- St. Vrain Valley School District RE-1J v. Loveland by and through Loveland, 2017 CO 54, 395 P.3d 751, 344 Ed. Law Rep. 551 (Colo. 2017)—12:15
- Subryan v. Regents of the University of Colorado, 789 P.2d 472, 59 Ed. Law Rep. 889 (Colo. App. 1989)—5:4
- Suchey v. Stiles, 155 Colo. 363, 394 P.2d 739 (1964)—17:4
- Sumerel v. Goodyear Tire & Rubber Co., 232 P.3d 128 (Colo. App. 2009)—30:1, 30:3
- Summit Const. Co. v. Yeager Garden Acres, Inc., 28 Colo. App. 110, 470 P.2d 870 (App. 1970)—30:49
- Sunahara v. State Farm Mut. Auto. Ins. Co., 2012 CO 30M, 280 P.3d 649 (Colo. 2012)—6:1, 10:3
- Sundheim v. Board of County Com'rs of Douglas County, 904 P.2d 1337 (Colo. App. 1995)—28:1, 28:13
- Sung v. McCullough, 651 P.2d 447 (Colo. App. 1982)—30:25
- Sun Indem. Co. of N.Y. v. Landis, 119 Colo. 191, 201 P.2d 602 (1948)—5:7
- Sunshine v. M. R. Mansfield Realty, Inc., 195 Colo. 95, 575 P.2d 847 (1978)—30:1, 30:35
- Superior Distributing Corp. v. Points, 141 Colo. 113, 347 P.2d 140 (1959)—30:6
- Surdyka v. DeWitt, 784 P.2d 819 (Colo. App. 1989)—5:4, 25:3, 25:11
- Suthers, State ex rel. v. Mandatory Poster Agency, Inc., 260 P.3d 9 (Colo. App. 2009)—29:2, 29:3
- Suydam v. LFI Fort Pierce, Inc., 2020 COA 144M, 2020 WL 5949829 (Colo. App. 2020)—8:8, 8:22
- S.W. v. Towers Boat Club, Inc., 2013 CO 72, 315 P.3d 1257 (Colo. 2013)—12:4, 12:5
- Swaim v. Swanson, 118 Colo. 509, 197 P.2d 624 (1948)—3:1, 3:12
- Swartz v. Bianco Family Trust, 874 P.2d 430 (Colo. App. 1993)—24:1, 24:7
- Swerdfeger v. Krueger, 145 Colo. 180, 358 P.2d 479 (1960)—13:1
- Swieckowski by Swieckowski v. City of Ft. Collins, 934 P.2d 1380 (Colo. 1997)—12:15
- S.X.M., People ex rel., 271 P.3d 1124 (Colo. App. 2011)—41:1, 41:4, 41:19
- Szymanski v. Department of Highways of State of Colo., 776 P.2d 1124 (Colo. App. 1989)—12:15

## T

- T-A-L-L, Inc. v. Moore and Co., 765 P.2d 1039 (Colo. App. 1988)—26:5, 30:56
- Taco Bell, Inc. v. Lannon, 744 P.2d 43 (Colo. 1987)—9:1, 9:20
- Tait ex rel. Tait v. Hartford Underwriters Ins. Co., 49 P.3d 337 (Colo. App. 2001)—5:4, 25:2, 25:11

## TABLE OF CASES

- Tancrede v. Freund, 2017 COA 36, 401 P.3d 132 (Colo. App. 2017)—12:1, 12:2, 12:3
- Tanski v. Tanski, 820 P.2d 1143 (Colo. App. 1991)—10:2
- Tarco, Inc. v. Conifer Metropolitan District, 2013 COA 60, 316 P.3d 82 (Colo. App. 2013)—30:25
- Taylor v. Goldsmith, 870 P.2d 1264 (Colo. App. 1994)—22:23, 22:24
- Taylor v. Taylor, 2016 COA 100, 381 P.3d 428 (Colo. App. 2016)—26:1, 26:2, 26:5
- TCD, Inc. v. American Family Mut. Ins. Co., 2012 COA 65, 296 P.3d 255 (Colo. App. 2012)—25:1
- Teare v. Sussman, 120 Colo. 488, 210 P.2d 446 (1949)—19:7, 19:12, 19:17
- Technical Computer Services, Inc. v. Buckley, 844 P.2d 1249 (Colo. App. 1992)—5:2, 17:11, 31:7
- Teiken v. Reynolds, 904 P.2d 1387 (Colo. App. 1995)—15:1
- Teilhaver Mfg. Co. v. Unarco Materials Storage, a Div. of Unarco Industries, Inc., 791 P.2d 1164 (Colo. App. 1989)—22:14
- Telluride Real Estate Co. v. Penthouse Affiliates, LLC, 996 P.2d 151 (Colo. App. 1999)—27:1
- Temple Hoyne Buell Foundation v. Holland & Hart, 851 P.2d 192 (Colo. App. 1992)—15:21, 15:22, 30:17
- Teneyck v. Roller Hockey Colorado, Ltd., 10 P.3d 707 (Colo. App. 2000)—12:1
- Teodonno v. Bachman, 158 Colo. 1, 404 P.2d 284 (1965)—19:2
- Tepley v. Public Employees Retirement Ass'n, 955 P.2d 573, 125 Ed. Law Rep. 937 (Colo. App. 1997)—26:2
- Terrones v. Tapia, 967 P.2d 216 (Colo. App. 1998)—30:39
- Terror Min. Co., Inc. v. Roter, 866 P.2d 929 (Colo. 1994)—9:1, 9:30
- Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)—21:11
- Terry v. Sullivan, 58 P.3d 1098 (Colo. App. 2002)—6:5
- Thayer v. Kirchhof, 83 Colo. 480, 266 P. 225 (1928)—8:6, 8:7
- Thirsk v. Ethicon, Inc., 687 P.2d 1315 (Colo. App. 1983)—14:1
- Thompson v. Colorado and Eastern R. Co., 852 P.2d 1328 (Colo. App. 1993)—4:20, 9:24, 9:26, 9:28, 9:29
- Thompson v. Maryland Cas. Co., 84 P.3d 496 (Colo. 2004)—17:1, 25:1
- Thompson v. McCormick, 149 Colo. 465, 370 P.2d 442 (1962)—30:31
- Thompson v. Public Service Co. of Colorado, 800 P.2d 1299 (Colo. 1990)—22:18
- Thompson v. Riveland, 714 P.2d 1338 (Colo. App. 1986)—9:1
- Thompson v. Tartler, 166 Colo. 247, 443 P.2d 365 (1968)—2:5, 6:1, 6:2
- Thornbury v. Allen, 991 P.2d 335 (Colo. App. 1999)—9:1, 12:1, 12:2, 12:3
- Thorstad, In re Marriage of, 2019 COA 13, 434 P.3d 165 (Colo. App. 2019)—17:10
- Tibbetts, In re Marriage of, 2018 COA 117, 428 P.3d 686 (Colo. App. 2018)—7:1
- Time, Inc. v. Firestone, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976)—22:1
- Time, Inc. v. Pape, 401 U.S. 279, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971)—22:1, 22:3

- Timm v. Prudential Ins. Co. of America, 259 P.3d 521 (Colo. App. 2011)—25:2, 25:4
- Tisch v. Tisch, 2019 COA 41, 439 P.3d 89 (Colo. App. 2019)—32:4, 32:6
- Tisdell v. Central Sav. Bank & Trust Co., 90 Colo. 114, 6 P.2d 912 (1931)—19:16, 30:18
- Todd Holding Co., Inc. v. Super Valu Stores, Inc., 874 P.2d 402 (Colo. App. 1993)—26:3, 34:18
- Tolman v. CenCor Career Colleges, Inc., Div. of CenCor, Inc., 851 P.2d 203, 82 Ed. Law Rep. 932 (Colo. App. 1992)—9:1, 15:25
- Tong's Estate, Matter of, 619 P.2d 91 (Colo. App. 1980)—34:9
- Tonnessen v. Denver Pub. Co., 5 P.3d 959 (Colo. App. 2000)—22:1, 22:6, 22:8, 22:11, 22:19, 22:25, 23:1, 23:2, 28:8
- Toothman v. Freeborn & Peters, 80 P.3d 804 (Colo. App. 2002)—4:20
- Top Rail Ranch Estates, LLC v. Walker, 2014 COA 9, 327 P.3d 321 (Colo. App. 2014)—19:1, 19:2
- Torrez v. Edwards, 107 P.3d 1110 (Colo. App. 2004)—15:18
- Total Condominium Management, Inc. v. Lester J. Lambert & Co., 716 P.2d 146 (Colo. App. 1985)—30:38
- Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980)—31:4
- Towns v. Anderson, 195 Colo. 517, 579 P.2d 1163 (1978)—9:2
- Townsend v. Daniel, Mann, Johnson & Mendenhall, 196 F.3d 1140 (10th Cir. 1999)—30:4
- Tozer v. Scott Wetzel Services, Inc., 883 P.2d 496 (Colo. App. 1994)—25:2
- Tracy v. Graf, 37 Colo. App. 323, 550 P.2d 886 (App. 1976)—9:17
- Tracz ex rel. Tracz v. Charter Centennial Peaks Behavioral Health Systems, Inc., 9 P.3d 1168 (Colo. App. 2000)—15:2, 23:1, 23:2
- Trailside Townhome Ass'n, Inc. v. Acierno, 880 P.2d 1197 (Colo. 1994)—9:1, 12:1, 12:2, 12:3
- Transamerica Premier Ins. Co. v. Brighton School Dist. 27J, 940 P.2d 348 (Colo. 1997)—25:2, 25:8
- Transit Equipment Co. v. Dyonisio, 154 Colo. 379, 391 P.2d 478 (1964)—7:4
- Trask v. Nozisko, 134 P.3d 544 (Colo. App. 2006)—18:1
- Trattler v. Citron, 182 P.3d 674 (Colo. 2008)—9:22
- Travelers Ins. Co. v. Savio, 706 P.2d 1258 (Colo. 1985)—25:1, 25:2, 25:3, 25:4, 25:5, 25:7, 25:8
- Travelers Property Casualty Company of America v. Stresscon Corporation, 2016 CO 22M, 370 P.3d 140 (Colo. 2016)—25:1, 30:31
- Traver v. Dodd, 24 Colo. App. 273, 133 P. 1117 (1913)—18:4
- Tri-Aspen Const. Co. v. Johnson, 714 P.2d 484 (Colo. 1986)—5:4, 9:30, 30:54
- Tricon Kent Co. v. Lafarge North America, Inc., 186 P.3d 155 (Colo. App. 2008)—30:50
- Trimble v. City and County of Denver, 697 P.2d 716 (Colo. 1985)—19:1, 19:17, 24:1, 24:3, 24:6, 30:18
- Trinity Broadcasting of Denver, Inc. v. City of Westminster, 848 P.2d 916 (Colo. 1993)—12:15

## TABLE OF CASES

- Trinity Universal Ins. Co. v. Streza, 8 P.3d 613 (Colo. App. 2000)—9:7, 9:14
- Trione v. Mike Wallen Standard, Inc., 902 P.2d 454 (Colo. App. 1995)—9:17
- Tripp v. Borchard, 29 P.3d 345 (Colo. App. 2001)—15:19
- Tripp v. Parga, 847 P.2d 165 (Colo. App. 1992)—30:25
- Troutman v. Stiles, 87 Colo. 597, 290 P. 281 (1930)—19:10
- Troutman v. Webster, 82 Colo. 93, 257 P. 262 (1927)—30:7
- Trujillo v. Colorado Division of Insurance, 2014 CO 17, 320 P.3d 1208 (Colo. 2014)—26:2
- Trujillo v. Wilson, 117 Colo. 430, 189 P.2d 147 (1948)—6:11
- Trust of Franzen, Matter of, 955 P.2d 1018 (Colo. 1998)—8:9
- T.S. By Pueblo County Dept. of Social Services v. G.G., 679 P.2d 118 (Colo. App. 1984)—1:5
- Tubbs v. Farmers Insurance Exchange, 2015 COA 70, 353 P.3d 924 (Colo. App. 2015)—25:2
- Tucker v. Volunteers of America Colorado Branch, 211 P.3d 708 (Colo. App. 2008)—12:1, 12:2, 12:3
- Tung Chan v. HEI Resources, Inc., 2020 COA 87, 2020 WL 2963237 (Colo. App. 2020)—7:3, 7:4
- Tunget v. Board of County Com'rs of Delta County, 992 P.2d 650 (Colo. App. 1999)—8:4
- Turkey Creek, LLC v. Rosania, 953 P.2d 1306 (Colo. App. 1998)—7:4, 15:18, 26:2, 26:4
- Turman v. Castle Law Firm, LLC, 129 P.3d 1103 (Colo. App. 2006)—15:18
- Tuttle v. ANR Freight System, Inc., 797 P.2d 825 (Colo. App. 1990)—30:10, 31:4
- 23 LTD v. Herman, 2019 COA 113, 457 P.3d 754 (Colo. App. 2019)—30:8
- Twin Lakes Reservoir & Canal Co. v. Bond, 156 Colo. 433, 399 P.2d 793 (1965)—30:14
- Two, Inc. v. Gilmore, 679 P.2d 116 (Colo. App. 1984)—19:14

## U

- Uinta Oil Refining Co. v. Ledford, 125 Colo. 429, 244 P.2d 881 (1952)—30:39
- Underwood v. Dillon Companies, Inc., 936 P.2d 612 (Colo. App. 1997)—16:6, 32:1
- Union Ins. Co. v. RCA Corp., 724 P.2d 80 (Colo. App. 1986)—14:1
- Union Pacific R. Co. v. Martin, 209 P.3d 185 (Colo. 2009)—9:24, 12:1, 12:2, 12:3
- Union Pac. R. Co. v. Cogburn, 136 Colo. 184, 315 P.2d 209 (1957)—9:13, 11:1
- Union Pac. R. Co. v. Dennis, 73 Colo. 66, 213 P. 332 (1923)—21:1, 21:2, 21:5
- Union Pac. Ry. Co. v. Jones, 21 Colo. 340, 40 P. 891 (1895)—7:2
- Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276, 25 U.C.C. Rep. Serv. 134, 2 A.L.R.4th 245 (1978)—14:1, 14:3, 14:4, 14:22, 14:25, 15:1

- United Blood Services, a Div. of Blood Systems, Inc. v. Quintana, 827 P.2d 509 (Colo. 1992)—15:2, 15:3, 15:26
- United Coal Co. v. Canon City Coal Co., 24 Colo. 116, 48 P. 1045 (1897)—18:4
- United Fire & Cas. Co. v. Nissan Motor Corp. in U.S.A., 164 Colo. 42, 433 P.2d 769 (1967)—19:13, 26:4, 34:18
- United States Welding, Inc. v. Advanced Circuits, Inc., 2018 CO 56, 420 P.3d 278 (Colo. 2018)—5:2, 30:28, 30:37
- Universal Resources Corp. v. Ledford, 961 P.2d 593 (Colo. App. 1998)—30:25
- University of Denver v. Whitlock, 744 P.2d 54, 42 Ed. Law Rep. 950 (Colo. 1987)—9:1
- Univex Intern., Inc. v. Orix Credit Alliance, Inc., 914 P.2d 1355, 29 U.C.C. Rep. Serv. 2d 734 (Colo. 1996)—30:7
- UNUM Life Ins. Co. of America v. Ward, 526 U.S. 358, 119 S. Ct. 1380, 143 L. Ed. 2d 462 (1999)—25:2
- Uptain v. Huntington Lab, Inc., 723 P.2d 1322, 58 A.L.R.4th 49 (Colo. 1986)—14:4, 14:27
- Uptain v. Huntington Lab, Inc., 685 P.2d 218 (Colo. App. 1984)—14:5, 14:5A, 14:26
- Urbaniak v. Newton, 226 Cal. App. 3d 1128, 277 Cal. Rptr. 354 (1st Dist. 1991)—28:9
- U.S. v. Arvizu, 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002)—21:11
- U.S. v. Imperial Irr. Dist., 799 F. Supp. 1052 (S.D. Cal. 1992)—18:1
- U.S., People ex rel., 121 P.3d 326 (Colo. App. 2005)—41:1
- USAA v. Parker, 200 P.3d 350 (Colo. 2009)—25:9
- U.S. Fax Law Center, Inc. v. T2 Technologies, Inc., 183 P.3d 642 (Colo. App. 2007)—29:1
- U.S. Fidelity & Guar. Co. v. Budget Rent-A-Car Systems, Inc., 842 P.2d 208 (Colo. 1992)—30:35
- U.S. Fidelity & Guar. Co. v. Salida Gas Service Co., 793 P.2d 602 (Colo. App. 1989)—9:7, 9:17
- U.S. Fire Ins. Co. v. Sonitrol Management Corp., 192 P.3d 543 (Colo. App. 2008)—9:30
- Utz v. Moss, 31 Colo. App. 475, 503 P.2d 365 (App. 1972)—30:54

## V

- Vaccaro v. American Family Ins. Group, 2012 COA 9M, 275 P.3d 750 (Colo. App. 2012)—25:3, 25:5, 25:7
- Vail/Arrowhead, Inc. v. District Court for the Fifth Judicial Dist., Eagle County, 954 P.2d 608 (Colo. 1998)—30:20
- Vail Nat. Bank v. Finkelman, 800 P.2d 1342, 13 U.C.C. Rep. Serv. 2d 799 (Colo. App. 1990)—8:15
- Valdez v. Cantor, 994 P.2d 483 (Colo. App. 1999)—30:35, 31:1
- Valdez v. City and County of Denver, 764 P.2d 393 (Colo. App. 1988)—20:12
- Valley Development Co. v. Weeks, 147 Colo. 591, 364 P.2d 730 (1961)—5:2, 18:4

## TABLE OF CASES

- Vanadium Corp. of America v. Wesco Stores Co., 135 Colo. 77, 308 P.2d 1011 (1957)—14:12
- Vanderbeek v. Vernon Corp., 50 P.3d 866 (Colo. 2002)—5:6
- Van Diest v. Towle, 116 Colo. 204, 179 P.2d 984, 171 A.L.R. 304 (1947)—30:26
- Van Hall v. Gehrke, 117 Colo. 223, 185 P.2d 1016 (1947)—30:5, 30:6
- Van Meter v. Bass, 40 Colo. 78, 90 P. 637 (1907)—17:7, 17:8
- Van Orman v. Van Orman, 30 Colo. App. 177, 492 P.2d 81 (App. 1971)—7:2
- Van Rees v. Unleaded Software, Inc., 2016 CO 51, 373 P.3d 603 (Colo. 2016)—19:1, 32:4
- Van Schaack v. Van Schaack Holdings, Ltd., 856 P.2d 15 (Colo. App. 1992)—26:5
- Van Schaack & Co. v. Perkins, 129 Colo. 567, 272 P.2d 269 (1954)—6:1
- Van Winkle v. Transamerica Title Ins. Co., 697 P.2d 784 (Colo. App. 1984)—9:4
- Vaughan v. McMinn, 945 P.2d 404 (Colo. 1997)—25:2
- Veintimilla v. Dobyanski, 975 P.2d 1122 (Colo. App. 1997)—8:4
- Venetucci v. City of Colorado Springs, 99 Colo. 389, 63 P.2d 462 (1936)—3:8
- Vento v. Colorado Nat. Bank-Pueblo, 907 P.2d 642 (Colo. App. 1995)—1:5
- Vick v. Zumwalt, 130 Colo. 148, 273 P.2d 1010 (1954)—11:15
- Vickery v. Evans, 266 P.3d 390 (Colo. 2011)—5:4
- Vickery v. Vickery, 271 P.3d 516 (Colo. App. 2010)—5:4
- Victorio Realty Group, Inc. v. Ironwood IX, 713 P.2d 424 (Colo. App. 1985)—8:1
- Vigil v. Franklin, 103 P.3d 322 (Colo. 2004)—12:1, 12:2, 12:3
- Vigil v. Franklin, 81 P.3d 1084 (Colo. App. 2003)—12:1
- Vigil v. People, 731 P.2d 713 (Colo. 1987)—1:12
- Vigoda v. Denver Urban Renewal Authority, 646 P.2d 900 (Colo. 1982)—30:7
- Vikell Investors Pacific, Inc. v. Hampden, Ltd., 946 P.2d 589 (Colo. App. 1997)—8:18, 12:14, 26:2, 26:4
- Vikman v. International Brothl. of Elec. Workers, Local Union No. 1269, 889 P.2d 646 (Colo. 1995)—23:1
- Villalpando v. Denver Health and Hosp. Authority, 181 P.3d 357, 232 Ed. Law Rep. 436 (Colo. App. 2007)—8:1, 8:11, 15:1
- Villandry v. Gregerson, 824 P.2d 829 (Colo. App. 1991)—6:1
- Villa Sierra Condominium Ass'n v. Field Corp., 878 P.2d 161 (Colo. App. 1994)—30:9
- Vinton v. Virzi, 2012 CO 10, 269 P.3d 1242 (Colo. 2012)—19:1, 19:8, 19:9, 19:10
- Virdanco, Inc. v. MTS Intern., 820 P.2d 352 (Colo. App. 1991)—5:4, 26:1
- Virgil v. Sports Illustrated, 424 F. Supp. 1286 (S.D. Cal. 1976)—28:9
- Vista Resorts, Inc. v. Goodyear Tire & Rubber Co., 117 P.3d 60 (Colo. App. 2004)—14:1, 14:4, 14:19, 29:4, 29:6
- Vitetta v. Corrigan, 240 P.3d 322 (Colo. App. 2009)—15:15, 15:16
- Vititoe v. Rocky Mountain Pavement Maintenance, Inc., 2015 COA 82, 412 P.3d 767 (Colo. App. 2015)—9:6, 11:12

- Vivian v. Board of Trustees of Colo. School of Mines, 152 Colo. 556, 383 P.2d 801 (1963)—36:1, 36:2, 36:3
- Vogel v. Carolina Intern., Inc., 711 P.2d 708, 42 U.C.C. Rep. Serv. 769 (Colo. App. 1985)—23:2, 30:25
- Voight v. Colorado Mountain Club, 819 P.2d 1088 (Colo. App. 1991)—5:4, 9:20, 9:22
- Volunteers of America Colorado Branch v. Gardenswartz, 242 P.3d 1080 (Colo. 2010)—6:1, 12:1, 12:2, 12:3
- Volz v. Williams, 112 Colo. 592, 152 P.2d 996 (1944)—12:10
- Vu, Inc. v. Pacific Ocean Marketplace, Inc., 36 P.3d 165 (Colo. App. 2001)—30:7

W

- Wade v. Olinger Life Ins. Co., 192 Colo. 401, 560 P.2d 446 (1977)—19:4
- Wagner v. Board of County Com'rs of Rio Blanco County, 933 P.2d 1311 (Colo. 1997)—17:1
- Wagner v. Dan Unfug Motors, Inc., 35 Colo. App. 102, 529 P.2d 656, 16 U.C.C. Rep. Serv. 732 (App. 1974)—6:13, 19:17
- Wagner v. Planned Parenthood Federation of America, Inc., 2019 COA 26, 471 P.3d 1089 (Colo. App. 2019)—9:1, 9:21
- Wagner v. Travelers Property Cas. Co. of America, 209 P.3d 1119 (Colo. App. 2008)—25:8
- Wainscott v. Centura Health Corporation, 2014 COA 105, 351 P.3d 513 (Colo. App. 2014)—19:2, 29:2
- Wal-Mart Stores, Inc. v. Crossgrove, 2012 CO 31, 276 P.3d 562 (Colo. 2012)—6:1, 10:3
- Wal-Mart Stores, Inc. v. United Food and Commercial Workers International Union, 2016 COA 72, 382 P.3d 1249 (Colo. App. 2016)—18:1
- Walcott v. Total Petroleum, Inc., 964 P.2d 609 (Colo. App. 1998)—9:7, 9:21, 14:27
- Walford v. Blinder, Robinson & Co., Inc., 793 P.2d 620 (Colo. App. 1990)—17:1
- Walker v. Associated Press, 160 Colo. 361, 417 P.2d 486 (1966)—22:1, 22:23
- Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450 (1975)—22:1, 22:3, 22:15, 22:26, 22:27, 28:5
- Walker v. City of Denver, 720 P.2d 619 (Colo. App. 1986)—18:1
- Walker v. Ford Motor Company, 2017 CO 102, 406 P.3d 845 (Colo. 2017)—14:3
- Walker v. Hunter, 86 Colo. 483, 283 P. 48 (1929)—22:18
- Walker v. Van Laningham, 148 P.3d 391 (Colo. App. 2006)—17:10, 27:1
- Wall v. Foster Petroleum Corp., 791 P.2d 1148 (Colo. App. 1989)—30:54
- Wallbank v. Rothenberg, 140 P.3d 177 (Colo. App. 2006)—15:15
- Wallbank v. Rothenberg, 74 P.3d 413 (Colo. App. 2003)—15:3, 15:14, 15:15
- Wallick v. Eaton, 110 Colo. 358, 134 P.2d 727 (1943)—19:1, 30:27
- Wallin v. McCabe, 293 P.3d 81 (Colo. App. 2011)—15:18
- Wallman v. Kelley, 976 P.2d 330 (Colo. App. 1998)—14:8, 14:14, 14:15

## TABLE OF CASES

- Walton v. State, 968 P.2d 636, 131 Ed. Law Rep. 272 (Colo. 1998)—12:15
- Ward v. Ward, 25 Colo. 33, 52 P. 1105 (1898)—3:16
- Warembourg v. Excel Electric, Inc., 2020 COA 103, 471 P.3d 1213 (Colo. App. 2020)—9:6, 12:1, 12:3
- Wark v. Board of County Com'rs of County of Dolores, 47 P.3d 711 (Colo. App. 2002)—12:15
- Wark v. McClellan, 68 P.3d 574 (Colo. App. 2003)—9:1, 9:2, 9:22, 9:31
- Warne v. Hall, 2016 CO 50, 373 P.3d 588 (Colo. 2016)—24:1, 24:3
- Wasalco, Inc. v. El Paso County, 689 P.2d 730 (Colo. App. 1984)—24:1
- Washington County Bd. of Equalization v. Petron Development Co., 109 P.3d 146 (Colo. 2005)—30:34
- Waskel v. Guaranty Nat. Corp., 23 P.3d 1214 (Colo. App. 2000)—17:1
- Wassenich v. City and County of Denver, 67 Colo. 456, 186 P. 533 (1919)—36:6, 36:8
- Water Rights of Town of Minturn, Application for, 2015 CO 61, 359 P.3d 29 (Colo. 2015)—26:2
- Water, Waste & Land, Inc. v. Lanham, 955 P.2d 997 (Colo. 1998)—8:2
- Watrous v. Hilliard, 38 Colo. 255, 88 P. 185 (1906)—30:43
- Watson v. Cal-Three, LLC, 254 P.3d 1189 (Colo. App. 2011)—5:4
- Watson v. Public Service Co. of Colorado, 207 P.3d 860 (Colo. App. 2008)—31:4
- Watson v. Regional Transp. Dist., 762 P.2d 133 (Colo. 1988)—7:5
- Watson v. Settlemeyer, 150 Colo. 326, 372 P.2d 453 (1962)—24:1, 24:2, 24:5
- Watson v. United Farm Agency, Inc., 165 Colo. 439, 439 P.2d 738 (1968)—30:51
- Webb v. Dessert Seed Co., Inc., 718 P.2d 1057, 1 U.C.C. Rep. Serv. 2d 738 (Colo. 1986)—9:20, 9:21, 14:17, 30:39
- Webster v. Boone, 992 P.2d 1183 (Colo. App. 1999)—5:4, 6:11, 9:2, 18:4
- Webster v. Konczak Corp., 976 P.2d 317 (Colo. App. 1998)—31:12
- Weil v. First Nat. Bank of Castle Rock, 983 P.2d 812, 41 U.C.C. Rep. Serv. 2d 861 (Colo. App. 1999)—9:1
- Weinstein v. Colborne Foodbotics, LLC, 2013 CO 33, 302 P.3d 263 (Colo. 2013)—3:7, 9:4, 26:2
- Weisbart, In re Marriage of, 39 Colo. App. 115, 564 P.2d 961 (App. 1977)—7:2
- Weiser, State ex rel. v. Castle Law Group, LLC, 2019 COA 49, 457 P.3d 699 (Colo. App. 2019)—29:4
- Weiss v. Axler, 137 Colo. 544, 328 P.2d 88 (1958)—3:5
- Weissman v. Crawford Rehabilitation Services, Inc., 914 P.2d 380 (Colo. App. 1995)—31:12, 31:16
- Welch v. George, 19 P.3d 675 (Colo. 2000)—6:5
- Weld County Court v. Richards, 812 P.2d 650 (Colo. 1991)—21:19
- Weller v. Cosmopolitan Homes, Inc., 44 Colo. App. 470, 622 P.2d 577 (App. 1980)—30:54
- Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc., 872 P.2d 1359 (Colo. App. 1994)—5:4, 9:6, 26:2, 30:16
- Wenner Petroleum Corp. v. Mitsui & Co. (U.S.A.), Inc., 748 P.2d 356, 5 U.C.C. Rep. Serv. 2d 1338 (Colo. App. 1987)—14:8, 14:16

- Werkmeister v. Robinson Dairy, Inc., 669 P.2d 1042 (Colo. App. 1983)—7:4
- Werner v. Schrader, 127 Colo. 523, 258 P.2d 766 (1953)—11:1
- Wertz v. Lawrence, 69 Colo. 540, 195 P. 647 (1921)—22:8
- Wertz v. Lawrence, 66 Colo. 55, 179 P. 813 (1919)—22:18, 22:26
- Wesley v. United Services Auto. Ass'n, 694 P.2d 855 (Colo. App. 1984)—9:21
- West Denver Feed Co. v. Ireland, 38 Colo. App. 64, 551 P.2d 1091 (App. 1976)—8:17
- Westec Const. Management Co. v. Postle Enterprises I, Inc., 68 P.3d 529 (Colo. App. 2002)—5:2
- Western Air Lines v. Hollenbeck, 124 Colo. 130, 235 P.2d 792 (1951)—30:8, 30:27
- Western Cities Broadcasting, Inc. v. Schueller, 849 P.2d 44 (Colo. 1993)—9:4, 19:1, 19:17, 30:18
- Western Cities Broadcasting, Inc. v. Schueller, 830 P.2d 1074 (Colo. App. 1991)—30:25
- Western Conference Resorts, Inc. v. Pease, 668 P.2d 973, 36 U.C.C. Rep. Serv. 131 (Colo. App. 1983)—5:6, 14:8, 14:15
- Western Distributing Co. v. Diodosio, 841 P.2d 1053 (Colo. 1992)—30:10, 30:11, 30:12, 30:15, 31:1, 31:3
- Western Fire Truck, Inc. v. Emergency One, Inc., 134 P.3d 570 (Colo. App. 2006)—8:1
- Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155 (Colo. App. 2008)—9:1
- Western Inv. & Land Co. v. First Nat. Bank, 64 Colo. 37, 172 P. 6 (1918)—8:14
- Western Slope Gas Co. v. Lake Eldora Corp., 32 Colo. App. 293, 512 P.2d 641 (App. 1973)—36:4
- Western Stock Center, Inc. v. Sevit, Inc., 195 Colo. 372, 578 P.2d 1045 (1978)—8:5, 8:18, 9:7, 9:7A, 12:11, 12:12
- Western Stone & Metal Corp. v. DIG HP1, LLC, 2020 COA 58, 465 P.3d 105 (Colo. App. 2020)—30:34
- Western Union Telegraph Co. v. Trinidad Bean & Elevator Co., 84 Colo. 93, 267 P. 1068 (1928)—30:39
- Westfield Development Co. v. Rifle Inv. Associates, 786 P.2d 1112 (Colo. 1990)—17:1, 17:9, 24:1, 24:3, 24:6, 24:7
- Westin Operator, LLC v. Groh, 2015 CO 25, 347 P.3d 606 (Colo. 2015)—9:1, 9:21
- Westminster, City of v. Centric-Jones Constructors, 100 P.3d 472 (Colo. App. 2003)—5:2, 25:2, 25:9, 25:11, 30:10, 30:40, 30:41, 30:49
- Westminster, City of v. Jefferson Center Associates, 958 P.2d 495 (Colo. App. 1997)—36:1, 36:8
- Whately v. Wood, 157 Colo. 552, 404 P.2d 537 (1965)—3:2
- Wheatridge Lumber Co., Inc. v. Valley Water Dist., 790 P.2d 874 (Colo. App. 1989)—9:1
- Wheeler v. Dunn, 13 Colo. 428, 22 P. 827 (1889)—19:7
- Wheeler v. Reese, 835 P.2d 572 (Colo. App. 1992)—25:1
- Wheeler and Lewis v. Slifer, 195 Colo. 291, 577 P.2d 1092 (1978)—15:26

## TABLE OF CASES

- Whitcomb v. City and County of Denver, 731 P.2d 749 (Colo. App. 1986)—9:1
- White v. Brock, 41 Colo. App. 156, 584 P.2d 1224 (App. 1978)—8:12, 26:5
- White v. Caterpillar, Inc., 867 P.2d 100 (Colo. App. 1993)—14:1, 14:3, 14:4, 14:25, 14:27
- White v. Hansen, 837 P.2d 1229 (Colo. 1992)—5:4, 9:22, 9:30
- White v. Jungbauer, 128 P.3d 263 (Colo. App. 2005)—15:19
- White v. Mississippi Order Buyers, Inc., 648 P.2d 682, 33 U.C.C. Rep. Serv. 1303 (Colo. App. 1982)—14:8
- White v. Muniz, 999 P.2d 814 (Colo. 2000)—20:1, 20:3, 20:5, 20:7, 20:8
- White v. Rose, 241 F.2d 94 (10th Cir. 1957)—14:19
- Whitenhill v. Kaiser Permanente, 940 P.2d 1129 (Colo. App. 1997)—10:3
- Whiting-Turner Contracting Company v. Guarantee Company of North America USA, 2019 COA 44, 440 P.3d 1282 (Colo. App. 2019)—30:12
- Whitley v. Andersen, 37 Colo. App. 486, 551 P.2d 1083 (App. 1976)—20:4, 20:5
- Widdifield v. Robertshaw Controls Co., 671 P.2d 989 (Colo. App. 1983)—23:2
- Widner v. Walsh, 3 Colo. 548, 1877 WL 438 (1877)—30:25
- Wiesen v. Short, 43 Colo. App. 374, 604 P.2d 1191 (App. 1979)—30:20
- Wigger v. McKee, 809 P.2d 999 (Colo. App. 1990)—17:1, 22:18
- Wiley v. Byrd, 158 Colo. 479, 408 P.2d 72 (1965)—19:1
- Willer v. City of Thornton, 817 P.2d 514 (Colo. 1991)—12:15
- Willey v. Mayer, 876 P.2d 1260, 23 U.C.C. Rep. Serv. 2d 1003 (Colo. 1994)—8:9, 8:9A, 8:9B, 8:10, 8:11
- William H. White Co., Inc. v. B&A Mfg. Co., 794 P.2d 1099, 12 U.C.C. Rep. Serv. 2d 28 (Colo. App. 1990)—5:4
- Williams v. Boyle, 72 P.3d 392 (Colo. App. 2003)—9:17, 15:1, 15:11, 19:1, 19:2, 22:18
- Williams v. Continental Airlines, Inc., 943 P.2d 10 (Colo. App. 1996)—9:1, 22:1
- Williams v. City and County of Denver, 147 Colo. 195, 363 P.2d 171 (1961)—36:3
- Williams v. District Court, Second Judicial Dist., City and County of Denver, 866 P.2d 908 (Colo. 1993)—22:4, 22:25
- Willis v. Perry, 677 P.2d 961 (Colo. App. 1983)—22:1, 22:3
- Willy v. Atchison, T. & S. F. Ry. Co., 115 Colo. 306, 172 P.2d 958 (1946)—10:1
- Wilson v. Board of County Com'rs of Adams County, 703 P.2d 1257 (Colo. 1985)—31:9
- Wilson v. Hill, 103 Colo. 409, 86 P.2d 1084 (1939)—9:6
- Wilson v. Meyer, 126 P.3d 276 (Colo. App. 2005)—22:1, 22:3, 22:7, 22:11, 22:19
- Wilson v. Mosko, 110 Colo. 127, 130 P.2d 927 (1942)—8:12
- Wilson and Co., Engineers and Architects v. Walsenburg Sand and Gravel Co., Inc., 779 P.2d 1386 (Colo. App. 1989)—30:39
- Wiltfong, In re Estate of, 148 P.3d 465 (Colo. App. 2006)—34:1, 34:2, 34:6

- Winer's Pumping Units v. Emerald Gas Operating Co., 936 P.2d 627 (Colo. App. 1997)—14:11
- Winkler v. Rocky Mountain Conference of United Methodist Church, 923 P.2d 152 (Colo. App. 1995)—9:1, 9:6, 23:1, 26:2, 26:5
- Winkler v. Shaffer, 2015 COA 63, 356 P.3d 1020 (Colo. App. 2015)—9:6, 9:8, 9:14
- Winston Financial Group, Inc. v. Fults Management, Inc., 872 P.2d 1356 (Colo. App. 1994)—8:1, 30:1, 30:56
- Winter v. Goebner, 2 Colo. App. 259, 30 P. 51 (1892)—30:7
- Winter Park Real Estate and Investments, Inc. v. Anderson, 160 P.3d 399 (Colo. App. 2007)—22:1
- Wisdom v. City of Sterling, 36 P.3d 106 (Colo. App. 2001)—12:15
- Wisehart v. Meganck, 66 P.3d 124 (Colo. App. 2002)—31:5
- Wisehart v. Zions Bancorporation, 49 P.3d 1200 (Colo. App. 2002)—19:2
- Wiser v. People, 732 P.2d 1139 (Colo. 1987)—1:5
- Wojtowicz v. Greeley Anesthesia Services, P.C., 961 P.2d 520 (Colo. App. 1997)—30:39, 30:40
- Wold v. City of Boulder, 91 Colo. 44, 9 P.2d 931 (1932)—12:15
- Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979)—22:1
- Wolther v. Schaarschmidt, 738 P.2d 25 (Colo. App. 1986)—9:4
- Woods v. Delgar Ltd., 226 P.3d 1178 (Colo. App. 2009)—12:7
- Woolsey v. Holiday Health Clubs and Fitness Centers, Inc., 820 P.2d 1201 (Colo. App. 1991)—9:1
- World of Sleep, Inc. v. Seidenfeld, 674 P.2d 1005 (Colo. App. 1983)—30:25
- Worley v. Sancetta, 540 P.2d 355 (Colo. App. 1975)—32:2
- Worthen Bank and Trust Co., Nat. Ass'n v. Silvercool Service Co., 687 P.2d 464 (Colo. App. 1984)—30:49
- Wright v. Vail Run Resort Community Ass'n, Inc., 917 P.2d 364 (Colo. App. 1996)—12:2
- Wright, ex rel. Wright, Estate of v. United Services Auto. Ass'n, 53 P.3d 683 (Colo. App. 2001)—10:3
- W. T. Rawleigh Co. v. Dickneite, 99 Colo. 276, 61 P.2d 1028 (1936)—30:7
- Wyatt v. Burdette, 43 Colo. 208, 95 P. 336 (1908)—17:8
- Wycoff v. Grace Community Church of Assemblies of God, 251 P.3d 1260 (Colo. App. 2010)—9:1, 12:2, 12:3
- Wycoff v. Seventh Day Adventist Ass'n of Colorado, 251 P.3d 1258 (Colo. App. 2010)—12:2, 12:3

**X**

- Xerox Corp. v. ISC Corp., 632 P.2d 618 (Colo. App. 1981)—19:2

**Y**

- Yadon v. Southward, 64 P.3d 909 (Colo. App. 2002)—15:1
- Yampa Valley Elec. Ass'n, Inc. v. Telecky, 862 P.2d 252 (Colo. 1993)—3:5, 9:6, 9:7
- Yellow Cab Co. v. Hodgson, 91 Colo. 365, 14 P.2d 1081, 83 A.L.R. 1156 (1932)—9:17

## TABLE OF CASES

- Yerton v. Bowden, 762 P.2d 786 (Colo. App. 1988)—30:40  
 Yoder v. Hooper, 695 P.2d 1182 (Colo. App. 1984)—7:3  
 Yorty v. Mortgage Finance, Inc., 29 Colo. App. 398, 485 P.2d 915 (App. 1971)—30:5, 30:6  
 Young v. Brighton School District 27J, 2014 CO 32, 325 P.3d 571, 305 Ed. Law Rep. 514 (Colo. 2014)—12:15  
 Young v. Burke, 139 Colo. 305, 338 P.2d 284 (1959)—3:15  
 Young, In re Marriage of, 682 P.2d 1233, 56 A.L.R.4th 991 (Colo. App. 1984)—30:27  
 Young By and Through Young v. Carpenter, 694 P.2d 861 (Colo. App. 1984)—15:1

## Z

- Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977)—28:3, 28:4  
 Zalnís v. Thoroughbred Datsun Car Co., 645 P.2d 292 (Colo. App. 1982)—23:2, 23:3, 23:4  
 Zambakian v. Leson, 79 Colo. 350, 246 P. 268 (1926)—30:46  
 Zambakian v. Leson, 77 Colo. 183, 234 P. 1065 (1925)—30:12  
 Zambruk v. Perlmutter 3rd Generation Builders, Inc., 32 Colo. App. 276, 510 P.2d 472 (App. 1973)—8:12  
 Zang v. Adams, 23 Colo. 408, 48 P. 509 (1897)—19:10  
 Zapp v. Kukuris, 847 P.2d 150 (Colo. App. 1992)—9:1  
 Zappa v. Seiver, 706 P.2d 440 (Colo. App. 1985)—24:5, 24:6  
 Zavorka v. Union Pacific R. Co., 690 P.2d 1285 (Colo. App. 1984)—9:13  
 Zeke Coffee, Inc. v. Pappas-Alstad Partnership, 2015 COA 104, 370 P.3d 261 (Colo. App. 2015)—5:2  
 Zeller v. Taylor, 95 Colo. 503, 37 P.2d 391 (1934)—8:12  
 Zertuche v. Montgomery Ward & Co., Inc., 706 P.2d 424 (Colo. App. 1985)—14:25  
 Zick v. Krob, 872 P.2d 1290 (Colo. App. 1993)—23:2, 30:7  
 Zimmer v. Celebrities, Inc., 44 Colo. App. 515, 615 P.2d 76 (App. 1980)—9:17  
 Zimmerman v. Dan Kamphausen Co., 971 P.2d 236 (Colo. App. 1998)—8:15, 9:4, 15:18  
 Zimmerman v. Franzen, 121 Colo. 574, 220 P.2d 344 (1950)—9:17  
 Zimmerman v. Hinderlider, 112 Colo. 277, 148 P.2d 813 (1944)—27:2  
 Zimmerman v. Loose, 162 Colo. 80, 425 P.2d 803 (1967)—19:8  
 Zolman v. Pinnacol Assur., 261 P.3d 490 (Colo. App. 2011)—25:3  
 Zueger v. Goss, 2014 COA 61, 343 P.3d 1028 (Colo. App. 2014)—22:1  
 Zwick v. Simpson, 193 Colo. 36, 572 P.2d 133 (1977)—6:11, 6:12, 18:4



# Index

## **ABOUT THE PLAINTIFF**

Defined, 22:8, 28:7

## **ABSOLUTE PRIVILEGE**

Libel and slander, 22:15

## **ABUSE OF PRIVILEGE**

False imprisonment or arrest, 21:19

## **ABUSE OF PROCESS**

Damages, 17:11

Elements of liability, 17:10

Ulterior purpose, defined, 17:12

## **ACCORD AND SATISFACTION**

Contracts, 30:28

## **ACCOUNTANTS**

Malpractice, 15:25 to 15:30

## **ACKNOWLEDGEMENT**

Wills, elements of proof, 34:2

## **ADMISSION OF FACT**

Stipulations as to, 1:13

## **ADMITTED LIABILITY**

Statement of case to be determined, 2:4

## **ADMONITIONS TO JURY**

Orientation of jury, 1:4, 1:9

## **AFFIRMATIVE DEFENSES**

Absolute privilege, libel and slander, 22:15

Abuse of privilege to arrest, 21:19

Advice of attorney, malicious prosecution, 17:7, 17:8

Arrest. False imprisonment or arrest, *infra*

Assault and battery

    battery defenses, 20:15 to 20:17

    consent, 20:11

    death or serious bodily injury, self-defense, 20:13

    defense of another, 20:14

    personal property, defense or recapture of, 20:16, 20:17

    real property, defense of, 20:15

    recapture of personal property, defense of, 20:17

    self-defense, 20:12, 20:13

    words alone as justification, 20:10

**AFFIRMATIVE DEFENSES—Cont'd**

Assumption of risk, products liability, 14:25, 14:28

Common law privilege to detain for investigation, 21:8

Comparative negligence

generally, 9:24

products liability, 14:28 to 14:33B

Consent

assault and battery, 20:11

false imprisonment or arrest, 21:6

invasion of privacy, 28:15

libel and slander, 22:20

malpractice of physicians and surgeons, consent of patient, 15:8, 15:9

trespass to land, 18:3

Contracts

interference with contractual obligations, 24:6

Damages

failure to mitigate, 5:2

nonuse of safety belt, 5:3

Death or serious bodily injury, self-defense, 20:13

Deceit. Fraud and deceit, *infra*

Defense of another, assault and battery, 20:14

Defense of self. Self-defense, *infra*

Fair comment, libel and slander, 22:19

False imprisonment or arrest

abuse of privilege to arrest, 21:19

arrest, defined, 21:12

arrest without warrant privilege, 21:10, 21:11, 21:15

common law privilege to detain for investigation, 21:8

consent, 21:6

defense of person privilege, 21:9

fresh pursuit, 21:14

guilt of person arrested, 21:18

intent to arrest, 21:16

probable cause, 21:13

statutory privilege to detain for investigation, 21:7

valid warrant, 21:17

Fresh pursuit, false imprisonment or arrest, 21:14

Guilt of person arrested, false imprisonment or arrest, 21:18

Intent to arrest, 21:16

Interference with contractual obligations, 24:6

Invasion of privacy

consent, 28:15

privilege, 28:13

statute of limitations, 28:14

Libel and slander

absolute privilege, 22:15

consent, 22:20

**AFFIRMATIVE DEFENSES—Cont'd**

Libel and slander—Cont'd

- fair comment, 22:19
- means of communication, privilege of, 22:18
- meetings, privileged reports of, 22:17
- qualified privilege, 22:16
- statute of limitations, 22:21
- substantial truth, 22:14

Malicious prosecution, advice of attorney, 17:7, 17:8

Malpractice of physicians and surgeons, consent of patient, 15:8, 15:9

Meetings, privileged reports of, 22:17

Mitigation of damages, 5:2

Negligence. Comparative negligence, *supra*

Personal property, defense or recapture of, 20:16, 20:17

Privilege

- abuse of privilege to arrest, 21:19
- common law privilege to detain for investigation, 21:8
- defense of person privilege, 21:9
- invasion of privacy, 28:13
- means of communication, privilege of, 22:18
- meetings, privileged reports of, 22:17

Products liability

- assumption of risk, 14:25, 14:28
- comparative fault, 14:28 to 14:33B
- negligence, comparative fault based on, 14:29
- special verdict forms, 14:30B to 14:33B
- unavoidably unsafe product, risk of, 14:26

Public-policy discharge claim, 31:16

Qualified privilege, libel and slander, 22:16

Real property, defense of, 20:15

Recapture of personal property, defense of, 20:17

Safety belt, nonuse of, 5:3

Self-defense

- assault and battery, 20:12, 20:13
- false imprisonment or arrest, 21:9

Special verdict forms, products liability, 14:30A to 14:33B

Statute of limitations

- invasion of privacy, 28:14
- libel and slander, 22:21

Statutory privilege to detain for investigation, 21:7

Substantial truth, libel and slander, 22:14

Trespass to land, consent, 18:3

Unavoidably unsafe product, risk of, 14:26

Valid warrant, false imprisonment or arrest, 21:17

Waiver by plaintiff before completion of performance, 19:16

Words alone as justification for assault and battery, 20:10

Wrongful discharge, after acquired evidence of fraud or other misconduct, 31:11, 31:16

**AFFIRMATIVE DEFENSES—Cont'd**

Wrongful discharge claim, 31:16

**AFTER-ACQUIRED EVIDENCE**

Public-policy discharge, affirmative defense, 31:16

**AGENCY**

Respondeat Superior, this index

**AGGRAVATION OF PRE-EXISTING CONDITION**

Damages for personal injuries, 6:8

**AMOUNT OF DAMAGES**

Personal injuries, damages for, 6:1A, 6:1B

Uncertainty as to, 5:6

**AMUSEMENT PARK DEVICES**

Premises liability, 12:13

**ANIMALS**

Damages, 13:5

Dog bite, serious bodily injury or death, 13:3

Domesticated animals, liability as respects, 13:1

Serious bodily injury

definition, 13:4

dog bite, 13:3

Wild animals, elements of liability, 13:2

**ANSWER**

Special interrogatories, answer to, 6:1B

**APPREHENSION**

Assault and battery, 20:2, 20:3

**APPROPRIATION**

Invasion of privacy, 28:4

**ARCHITECTS**

Malpractice, 15:25 to 15:30

**ARREST**

False Imprisonment or Arrest (this index)

**ASSAULT AND BATTERY**

Affirmative defenses

battery defenses, 20:15 to 20:17

consent, 20:11

death or serious bodily injury, self-defense, 20:13

defense of another, 20:14

personal property, defense or recapture of, 20:16, 20:17

real property, defense of, 20:15

recapture of personal property, defense of, 20:17

self-defense, 20:12, 20:13

words alone as justification, 20:10

## INDEX

### **ASSAULT AND BATTERY—Cont'd**

Apprehension, 20:2, 20:3

#### **Assault**

actual or nominal damages, 20:4

apprehension, 20:2, 20:3

elements of liability, 20:1

intent to place another in apprehension, 20:3

#### **Battery**

contact, 20:6

damages, 20:9

elements of liability, 20:5

intent, 20:7, 20:8

nominal damages, 20:9

transferred intent, 20:8

Consent as affirmative defenses, 20:11

Contact, defined, 20:6

#### **Damages**

assault, 20:4

battery, 20:9

Death, force calculated to inflict, 20:13

Defense of another as affirmative defense, 20:14

Intent, 20:3, 20:7, 20:8

Malpractice, battery by physicians, 15:7 to 15:9

Nominal damages, 20:4, 20:9

Personal property, defense or recapture of, 20:16, 20:17

Real property, defense of, 20:15

Recapture of personal property, defense of, 20:17

Self-defense, 20:12, 20:13

Transferred intent, 20:8

Words alone as justification, 20:10

### **ASSUMPTION OF RISK**

Products liability, 14:25

### **ATTESTATION BY WITNESSES**

Wills, 34:13

### **ATTORNEYS**

Fees, 5:7

Malicious prosecution, affirmative defense of advice of counsel, 17:7, 17:8

Malpractice, 15:18 to 15:24

### **ATTORNEYS' FEES**

Damages, 5:7

### **ATTRACTIVE NUISANCE DOCTRINE**

Premises liability, 12:4, 12:5

### **AT-WILL EMPLOYMENT**

Defined, 31:5

**BAD FAITH BREACH OF INSURANCE CONTRACT**

- Damages, 25:7 et seq.
- Elements of liability, 25:1, 25:2
- First-party claim cases, 25:2, 25:10
- Good faith duty, 25:6
- Punitive damages, 25:8, 25:11
- Statutory violation, 25:4, 25:10
- Third-party claim cases, elements of liability, 25:1
- Unreasonable delay or denial, 25:5

**BAILIFF**

- Oath of, 1:23

**BAILORS AND BAILEES**

- Definitions, 16:1, 16:3, 16:4
- Duty of bailee to bailor, 16:5
- Gratuitous bailment, 16:3
- Non-gratuitous bailment, 16:4
- Presumption of negligence, 16:6
- Return of property, failure as to, 16:6
- Third person, bailor's liability to, 16:2
- Warning, duty of, 16:3

**BATTERY**

- Assault and Battery (this index)

**BEVERAGES**

- Products liability, 14:20, 14:21

**BICYCLE OPERATORS**

- Duty of care, 11:3

**BRAKE OR EQUIPMENT FAILURE**

- Motor vehicles and highway traffic, 11:13

**BURDEN OF PROOF**

- Generally, 3:1 to 3:3
- Eminent domain, 36:2
- Wills, burden of proof on issue of sound mind, 34:10

**BURNING**

- Will, revocation of, 34:8, 34:9

**CAUSATION**

- Generally, 9:17 et seq.
- Concurrent causes, 9:19, 9:20
- Definition, 9:18
- Foreseeability, 9:21
- Intervening causes, 9:20
- Real estate brokers, transactional malpractice, 15:27

**CHANGE**

- Modification or change (this index)

## INDEX

### CHILDREN AND MINORS

- Damages for personal injuries, 6:2 to 6:4
- Dependency and Neglect** (this index)
- Emancipation, 7:2
- Juvenile Delinquency** (this index)
- Motor vehicles, duty or care of minor operators, 11:5
- Negligence
  - standard of care, 9:9
- Parent and Child** (this index)
- Premises liability, 12:4, 12:5
- Right to sue or defend, 7:1
- Standard of care, 9:9
- Wrongful death, 10:4

### CIRCUMSTANTIAL EVIDENCE

- Generally, 3:9

### CIVIL RIGHTS

- Public Employees, Civil Rights Claims of** (this index)

### CIVIL THEFT

- Generally, 32:4 to 32:7
- Actual damages, 32:6
- Damages, 32:6
- Elements, 32:4
- Intentionally, defined, 32:5
- Knowingly, defined, 32:5
- Statutory damages, 32:7

### CLEAR AND CONVINCING

- Defined, 3:2

### COMMON LAW

- Privilege to detain for investigation, 21:8

### COMMUNICATIONS

- Juror's communication with others, prohibition of, 1:4, 1:5

### COMPARATIVE NEGLIGENCE

- Affirmative defenses
  - generally, 9:24
  - products liability, 14:28 to 14:33B
- Children, standard of care, 9:9
- Definitions, 9:6
- Designated non-party, 9:28C, 9:28D, 14:32 to 14:33B
- Elements, 9:1 to 9:4, 9:26 et seq.
- Multiple defendants
  - designated nonparty involved, 9:28C, 9:28D
  - forms, 9:27B, 9:27D, 9:28D
  - mechanics for submitting, 9:27, 9:27A
- Products liability, affirmative defenses, 14:28 to 14:33B

**COMPARATIVE NEGLIGENCE—Cont'd**

- Single defendant
  - elements and effect, 9:26, 9:28
  - special verdict, 9:26A et seq., 9:28C, 9:28D
- Special verdict, 9:26A et seq.

**CONCEALMENT**

- Deceit and Fraud** (this index)

**CONCURRENT CAUSES**

- Generally, 9:19, 9:20

**CONDEMNATION**

- Eminent Domain** (this index)

**CONDUCT OF PERSONS**

- Communication with others, prohibition of, 1:4, 1:5
- Electronic communications, prohibition on, 1:5
- Jurors during trial, conduct of, 1:4, 1:5
- Outside information, prohibition on, 1:5

**CONFIDENTIAL RELATIONSHIPS**

- Fiduciary duty, breach of, 26:3
- Wills, 34:16 et seq.

**CONSCIOUS PRESENCE**

- Defined, 34:3

**CONSENT**

- Affirmative defenses
  - assault and battery, 20:11
  - false imprisonment or arrest, 21:6
  - invasion of privacy, 28:15
  - libel and slander, 22:20
  - malpractice of physicians and surgeons, consent of patient, 15:8, 15:9
  - trespass to land, 18:3
- Assault and battery, 20:11
- False imprisonment or arrest, 21:6
- Invasion of privacy, 28:15
- Libel and slander, 22:20
- Malpractice by physicians and surgeons
  - operation or treatment without consent of patient, 15:7
  - uninformed consent, 15:10 to 15:13
- Trespass to land, 18:3

**CONSORTIUM, LOSS OF**

- Damages for personal injuries, 6:5, 6:6

**CONSPIRACY**

- Elements of liability, 27:1
- Unlawful goal, defined, 27:3
- Unlawful means, defined, 27:2

## INDEX

### CONSTRUCTION AND INTERPRETATION

Contracts, 30:30 et seq.

### CONSTRUCTION CONTRACTS

Building and Construction Contracts (this index)

### CONSTRUCTIVE DISCHARGE

Generally, 31:9, 31:10

### CONSTRUCTIVE NOTICE

Duty to inquire, constructive knowledge from, 3:7

### CONSUMER PROTECTION ACT

Generally, 29:1 to 29:6

Actual damages, 29:5

Deceptive practices, definition, 29:2

Elements of liability, 29:1

False representation or misrepresentation, definition, 29:3

Significant impact on public, definition, 29:4

Treble damages, 29:6

### CONTACT

Assault and battery, 20:6

### CONTRACTS

Generally, 30:1 et seq.

Acceptance, 30:6

Accord and satisfaction, 30:28

Affirmative defenses

interference with contractual obligations, 24:6

Anticipatory breach, 30:13

Assignment, 30:17

Breach of contract, 30:10

Claims, elements of liability, 30:42, 30:44

Conditions precedent, 30:15

Consideration, 30:7

Construction against drafter, 30:35

Construction contracts. Building and construction contracts, *supra*

Counteroffer, 30:5

Damages, 30:37 to 30:41, 30:45 to 30:56

wrongful discharge, 31:7

Defenses

Generally, 30:18 to 30:29

Accord and satisfaction, 30:28

Duress, 30:20

Fraud in the inducement, 30:18

Impossibility of performance, 30:23

Mental incapacity, 30:22

Minority, 30:21

Mistake, 30:23

**CONTRACTS—Cont'd**

Defenses—Cont'd

- Novation, 30:29
- Rescission or cancellation, 30:27
- Statute of limitations, 30:26
- Undue influence, 30:19
- Waiver or estoppel, 30:25
- Duress, 30:20
- Formation, 30:1 to 30:9
- Fraud in the inducement, 30:18
- Implied duty of good faith and fair dealing, 30:16
- Impossibility of performance, 30:23
- Intent of parties, 30:31
- Interference with contractual obligations
  - affirmative defense, 24:6
  - damages, 24:7
  - elements of liability, 24:1
  - intent, defined, 24:2
  - interference, defined, 24:4
  - nominal damages, 24:7
  - terminable at will contracts, 24:5
  - voidable contracts, 24:5
- Interpretation, 30:30 to 30:36
- Liquidated damages, 30:40
- Mental incapacity, 30:22
- Minority, 30:21
- Mistake, 30:22
- Modification, 30:8
- Nominal damages, 30:41
- Novation, 30:29
- Offer, generally, 30:3
- Ordinary meaning, 30:33
- Performance, 30:10 to 30:17
- Rescission or cancellation, 30:27
- Revocation of offer, 30:4
- Special damages, 30:39
- Specific and general clauses, 30:36
- Statute of limitations, 30:26
- Substantial performance, 30:12
- Technical words, use of, 30:34
- Third party beneficiaries, 30:9
- Time of performance, 30:14
- Undue influence, 30:19
- Waiver or estoppel, 30:25
- Whole of contract, interpretation, 30:32
- Wrongful discharge, 31:7

## INDEX

### **CONTRIBUTORY NEGLIGENCE**

- Imputation of, 9:25
- Last clear chance, 9:32
- Malpractice, 15:6, 15:24, 15:30
- Physicians and surgeons, 15:6
- Wrongful death, 10:1, 10:2

### **CONVERSION**

- Generally, 32:1 to 32:3
- Damages, 32:3
- Elements, 32:1
- Intentional and substantial interference, defined, 32:2

### **COST APPROACH**

- Eminent domain, 36:9

### **COUNTERCLAIMS**

- Statement of case to be determined, 2:1, 2:2
- Verdict forms, 4:8, 4:9

### **COURT**

- Questions to witnesses by, 1:16

### **CREDIBILITY OF WITNESSES**

- Determination of, 3:16

### **CROSS-CLAIMANT**

- Verdict forms, 4:12, 4:13

### **CROSSWALK**

- Pedestrian in, 11:4

### **DAMAGES**

- Abuse of process, 17:11
- Affirmative defenses
  - failure to mitigate, 5:2
  - nonuse of safety belt, 5:3
- Aggravation of pre-existing condition, 6:8
- Amount of damages
  - personal injuries, 6:1A, 6:1B
  - uncertainty as to, 5:6
- Animals, 13:5
- Answer to special interrogatories, 6:1B
- Assault and battery, 20:4, 20:9
- Attorneys' fees, 5:7
- Civil theft, 32:6, 32:7
- Consortium, loss of, 6:5, 6:6
- Consumer Protection Act, actual damages, 29:5
- Consumer Protection Act, treble damages, 29:5
- Contracts, 30:37 to 30:41, 30:45 to 30:56, 31:7
- Conversion, 32:3
- Deceit based on fraud, 19:17

**DAMAGES—Cont'd**

- Earnings loss, 6:4
- Encumbrances, breach of covenant against, 30:56
- Exemplary or punitive damages
  - generally, 5:4
  - Consumer Protection Act, treble damages, 29:6
  - invasion of privacy, 28:17
  - libel and slander, 22:25
  - verdict forms, 4:5
- Extreme and outrageous conduct, 23:6
- False imprisonment or arrest, 21:5
- Fiduciary duty, breach of, 26:5
- Frivolous or groundless claims or defenses, 5:7
- General instructions relating to damages, 5:1 et seq.
- Income tax, effect of, 6:10
- Inferences prohibited, 5:1
- Insurance contracts, bad faith or unreasonable breach, 25:7 to 25:11
- Interference with contractual obligations, 24:7
- Invasion of privacy, 28:16, 28:17
- Libel and slander, 22:12 et seq., 22:23, 22:25
- Life expectancy, determination of, 5:5
- Loss of use, property damages, 6:13
- Malicious prosecution, 17:9
- Malpractice by physicians and surgeons, 15:14 to 15:17
- Market value, difference in, 6:11
- Measure, 30:38
- Minor children, personal injuries, 6:2 to 6:4
- Mitigation of damages, 5:2
- Mortality tables, 5:5
- Multiple recovery, 6:14
- Nominal damages
  - assault and battery, 20:4, 20:9
  - false imprisonment or arrest, 21:5
  - interference with contractual obligations, 24:7
  - trespass to land, 18:4
- Non-reduction, personal injuries, 6:7
- Parent's damages, 6:3
- Personal injuries
  - adults, 6:1
  - aggravation of pre-existing condition, 6:8
  - amount of damages, 6:1A, 6:1B
  - answer to special interrogatories, 6:1B
  - consortium, loss of, 6:5, 6:6
  - earnings loss, 6:4
  - income tax, effect of, 6:10
  - minor children, 6:2 to 6:4
  - non-reduction, 6:7

## INDEX

### DAMAGES—Cont'd

#### Personal injuries—Cont'd

- parent's damages, 6:3
- pre-existing condition, aggravation of, 6:8
- special interrogatories, 6:1A, 6:1B
- thin skull doctrine, 6:7
- unrelated second event, 6:9

#### Personal property damages, 6:11 to 6:13

#### Pre-existing condition, aggravation of, 6:8

#### Products liability, damage alone as proof of defect, 14:7

#### Property damages

- loss of use, 6:13
- market value, difference in, 6:11
- personal property, 6:11 to 6:13
- real property, 6:13A
- repair cost, 6:12

#### Punitive damages. Exemplary or punitive damages, *supra*

#### Real property. Property, *supra*

#### Repair cost, 6:12

#### Safety belt, nonuse of, 5:3

#### Special interrogatories, 6:1A, 6:1B

#### Statement of case to be determined, damages only in issue, 2:5, 2:6

#### Thin skull doctrine, 6:7

#### Wrongful death action under Section 13-21-202, C.R.S., 10:3

#### Wrongful deprivation of use of chattel, 30:55

#### Wrongful discharge, 31:7, 31:8, 31:15

#### Wrongs of another, 5:07

### DEADLOCKED JURIES

#### Generally, 4:3

### DEATH AND DEATH ACTIONS

#### Assault and battery, affirmative defenses, 20:13

#### Children, 10:4

#### Contributory negligence, 10:1, 10:2

#### Decedent, contributory negligence of, 10:1

#### Dog bite, serious bodily injury or death, 13:3

#### Plaintiff, contributory negligence of, 10:2

#### Section 13-21-202, C.R.S., action under, 10:3

### DECEIT AND FRAUD

#### Affirmative defenses

- public-policy discharge, 31:16

#### Concealment

- generally, 19:2
- defined, 19:6

#### Consumer Protection Act, deceptive practices definition, 29:2

#### Consumer Protection Act, false representation or misrepresentation definition, 29:3

**DECEIT AND FRAUD—Cont'd**

- Contracts, 30:18
- Damages, 19:17
- Definitions, 19:3, 19:4
- Disclosure duty, 19:5
- Elements of liability, 19:1, 19:2
- False representation
  - generally, 19:1
  - defined, 19:7
- Future intentions or promises, 19:12, 19:13
- Investigation duty, 19:10, 19:11
- Law, statements as to, 19:14
- Material fact defined, 19:4
- Negligence, misrepresentations causing loss or harm, 9:3
- Non-disclosure or concealment, generally, 19:2
- Opinion, statements as to, 19:15
- Products liability, misrepresented product, 14:22 to 14:24
- Puffing, 19:15
- Reliance, 19:7 to 19:11

**DEFAMATION**

- Libel and Slander** (this index)

**DEFENSE OF ANOTHER**

- Assault and battery, affirmative defenses, 20:14

**DEFENSE OF PERSON**

- Self-Defense** (this index)

**DEFINITIONS**

- Words and Phrases** (this index)

**DELIBERATIONS OF JURY**

- Application of law to evidence, 4:1A
- Deadlocked juries, 4:3
- Foreperson, selection of, 4:2
- Prolonged deliberations, 4:3
- Questions during, 4:2A
- Retirement of jury, duties upon, 4:2
- Summary closing instruction, 4:1

**DEPENDENCY AND NEGLECT**

- Generally, 41:1 et seq.
- Abandonment defined, 41:6
- Adjudication of no fault, 41:5
- Custody not required, 41:12
- Environment injurious to child's welfare, 41:10
- Explanation of proceedings, 41:3
- Introductory remarks to jury panel, 41:1
- Mistreatment or abuse, 41:8, 41:9
- Outline of procedures to jury, 41:2

**DEPENDENCY AND NEGLECT—Cont'd**

- Pattern of habitual abuse, 41:14
- Pattern of habitual abuse, elements, 41:14
- Proper parental care defined, 41:7
- Prospective harm, 41:16
- Run away from home defined, 41:13
- Special verdict, 41:17, 41:18
- Statement of case, 41:4
- Treatment of other children, 41:11
- Use of present tense, 41:19

**DEPOSITIONS**

- Evidence, depositions as, 3:10

**DESIGNATED NON-PARTY**

- Negligence, 9:28C et seq.
- Products liability, 14:32 et seq.

**DIRECTED VERDICT**

- Statement of case to be determined, 2:5, 2:6

**DIRECT EVIDENCE**

- Generally, 3:9

**DIRECTIONS OR INSTRUCTIONS**

- Jury view, directions upon, 1:15
- Products liability, 14:4

**DISCHARGE FROM EMPLOYMENT**

- Wrongful Discharge** (this index)

**DISCHARGE OF JURY**

- Mandatory instruction upon, 1:18

**DISCLOSURE DUTY**

- Deceit based on fraud, 19:5

**DISCRIMINATION**

- Public Employees, Civil Rights Claims of** (this index)

**DRIVING UNDER THE INFLUENCE**

- Motor vehicles and highway traffic, 11:14

**DURESS**

- Contracts, 30:20

**EARNINGS LOSS**

- Damages for personal injuries, 6:4

**ELECTRONIC COMMUNICATIONS**

- Prohibition of, 1:5

**EMANCIPATION**

- Minors, 7:2

## **EMINENT DOMAIN**

- Burden of proof as to issues, 36:2
- Comparable sales, consideration of, 36:7, 36:8
- Cost approach, 36:9
- Duties of commissioners, instruction as to, 36:1
- Income approach, 36:10
- Limitations on damages to residue, 36:5
- Market value, ascertainment of, 36:6
- Report of commissioners, 36:11
- Residue, damages and benefits to, 36:4, 36:5
- Valuation, 36:7
- Value of property taken, 36:3
- Verdict form, 36:11

## **EMOTIONAL DISTRESS**

- Extreme and Outrageous Conduct** (this index)

## **EMPLOYER AND EMPLOYEE**

- Civil rights. **Public Employees, Civil Rights Claims of** (this index)
- Public Employees, Civil Rights Claims of** (this index)
- Wrongful Discharge** (this index)

## **ENTITIES**

- Acts through individuals, 7:7

## **EVIDENCE**

- Admission of fact, stipulations as to, 1:13
- Burdens of proof, 3:1 to 3:3
- Circumstantial evidence, 3:9
- Clear and convincing, defined, 3:2
- Constructive knowledge based on duty to inquire, 3:7
- Court's questions to witnesses, 1:16
- Credibility of witnesses, determination of, 3:16
- Definitions, 3:1 to 3:3, 3:5, 3:6, 3:8, 3:9
- Depositions as evidence, 3:10
- Direct evidence, 3:9
- Directions upon jury view, 1:15
- Exhibits, 3:17
- Expert witnesses
  - generally, 3:15
  - mental health, 35:5
- General instructions during trial, 1:11 to 1:17
- Highlighted exhibits, 3:17
- Inquiry, constructive knowledge based on duty of, 3:7
- Judicial notice, weight of evidence, 3:8
- Jurors' questions to witnesses, 1:17
- Jury deliberations, application of law to evidence, 4:1A
- Loss or destruction of evidence, 3:13
- Malicious prosecution, proof of malice, 17:5

**EVIDENCE—Cont'd**

- Number of witness, 3:12
- Particular purpose only, admission of evidence for, 1:11
- Prejudice, 3:14
- Preponderance of evidence, 3:1, 3:12
- Presumptions and inferences, 3:6, 3:7
- Products liability, 14:7
- Questions to witnesses, 1:16, 1:17
- Reasonable doubt, defined, 3:3
- Rebuttable statutory presumptions, 3:6
- Rule 301, presumptions under, 3:5
- Shifting burden of going forward, 3:5, 3:6
- Speculation, 3:4
- Statutory presumptions, 3:6
- Stipulations, 1:13, 1:14, 3:8
- Stricken evidence, 1:12
- Sympathy, 3:14
- Testimony of witness, stipulations as to, 1:14
- Transcript, testimony read from, 3:11
- View by jury, directions upon, 1:15
- Weight of evidence, 3:8 to 3:18
- Wills, proof of validly executed will, 34:2, 34:5 to 34:6
- Witnesses, questions to, 1:16, 1:17
- Wrongful discharge claim, affirmative defense, 31:16

**EXCLUSION OF IMPLIED WARRANTIES**

- Products liability, 14:16

**EXEMPLARY OR PUNITIVE DAMAGES**

- Generally, 5:4
- Invasion of privacy, 28:17
- Libel and slander, 22:25
- Verdict forms, 4:5

**EXHIBITS**

- Generally, 3:17

**EXPERT WITNESSES**

- Generally, 3:15
- Mental health, 35:5

**EXPRESS WARRANTIES**

- Products liability, 14:8, 14:9

**EXTREME AND OUTRAGEOUS CONDUCT**

- Damages, 23:6
- Definition, 23:2
- Elements of liability, 9:2, 23:1
- Exercising legal rights in permissible manner, 23:5
- Negligence, elements of liability, 9:2
- Recklessly or with intent, defined, 23:3

**EXTREME AND OUTRAGEOUS CONDUCT—Cont'd**

Severe emotional distress, defined, 23:4

**FAIR COMMENT**

Libel and slander, affirmative defenses, 22:19

**FALSE**

Defined, 22:11

**FALSE IMPRISONMENT OR ARREST**

Abuse of privilege to arrest, 21:19

Affirmative defenses

abuse of privilege to arrest, 21:19

arrest, defined, 21:12

arrest without warrant privilege, 21:10, 21:11, 21:15

common law privilege to detain for investigation, 21:8

consent, 21:6

defense of person privilege, 21:9

fresh pursuit, 21:14

guilt of person arrested, 21:18

intent to arrest, 21:16

probable cause, 21:13

statutory privilege to detain for investigation, 21:7

valid warrant, 21:17

Arrest without warrant privilege, 21:10, 21:11, 21:15

Common law privilege to detain for investigation, 21:8

Consent, 21:6

Damages, 21:5

Defense of person privilege, 21:9

Definitions, 21:12

Elements of liability, 21:1

Fresh pursuit, affirmative defenses, 21:14

Guilt of person arrested, 21:18

Intent, 21:3, 21:4, 21:16

Nominal damages, 21:5

Probable cause, 21:13

Restriction of freedom of movement, 21:2

Statutory privilege to detain for investigation, 21:7

Valid warrant, 21:17

**FALSE LIGHT**

Defined, 28:12

Invasion of privacy, placing plaintiff in false light, 28:10

**FALSE REPRESENTATIONS**

**Deceit and Fraud** (this index)

**FAMILY CAR DOCTRINE**

Motor vehicles and highway traffic, vicarious liability, 11:15

## INDEX

### **FIDUCIARIES**

- Breach of fiduciary duty, 26:1 to 26:5
- Confidential relationships, 26:3, 26:4
- Damages, 26:5
- Definitions, 26:2, 26:4
- Wills, 34:19

### **FIFTH AMENDMENT**

- Presumptions arising from invocation of, 3:5A

### **FIRST-PARTY CLAIM CASES**

- Insurance contracts, bad faith or unreasonable breach, 25:2, 25:10

### **FITNESS FOR PARTICULAR PURPOSE**

- Warranty of, 14:13, 14:14

### **FOOD**

- Products liability, 14:12, 14:20, 14:21

### **FOREPERSON OF JURY**

- Selection of, 4:2

### **FORESEEABILITY**

- Negligence, causation, 9:21

### **FORMS OF VERDICTS**

- Generally, 4:4 to 4:13
- Counterclaims, 4:8, 4:9
- Cross-claimant, 4:12, 4:13
- Exemplary or punitive damages, 4:5
- Multiple parties, 4:7
- Special verdicts or interrogatories, 4:16
- Third party plaintiff or defendant, 4:10, 4:11

### **FRAUD**

- Deceit and Fraud** (this index)

### **FRESH PURSUIT**

- False imprisonment or arrest, affirmative defenses, 21:14

### **FRIVOLOUS CLAIMS OR DEFENSES**

- Damages, 5:7

### **FUTURE INTENTIONS OR PROMISES**

- Deceit based on fraud, 19:12, 19:13

### **GENERAL DAMAGES**

- Wrongful discharge, 31:7

### **GOOD FAITH**

- Bad Faith** (this index)

### **GOOD OR JUST CAUSE**

- Defined, 31:6

**GOVERNMENTAL STANDARDS**

Products liability, 14:5, 14:5A

**GRATUITOUS BAILMENT**

Generally, 16:3

**GRAVELY DISABLED**

Defined, 35:4

**GUILT OF PERSON ARRESTED**

False imprisonment or arrest, affirmative defenses, 21:18

**HANDICAPPED DRIVERS**

Duty of care, 11:6

**HEAD OF HOUSEHOLD**

Motor vehicles and highway traffic, vicarious liability, 11:16

**HIGHLIGHTED EXHIBITS**

Evidence, 3:17

**HOLOGRAPHIC WILLS**

Generally, 34:6

**HOUSEHOLD OR FAMILY**

Defined, 11:17

**HUSBAND AND WIFE**

**Spouse** (this index)

**IMPLIED WARRANTIES**

Fitness for a particular purpose, 14:13, 14:14

Malpractice, 15:4, 15:22, 15:28

Merchantability, 14:10, 14:11

Physicians and surgeons, malpractice by, 15:4

Premises liability, 12:8

Products liability

generally, 14:10 to 14:16

creation and exclusion or modification, 14:16

fitness for a particular purpose, 14:13, 14:14

merchantability, 14:10, 14:11

wholesomeness of food, 14:12

Wholesomeness of food, 14:12

**IMPOSSIBILITY OF PERFORMANCE**

Contracts, 30:23

**IMPUTATION**

Contributory negligence, imputation of negligence, 9:25

Driver's negligence imputed to owner, 11:18

**INCOME APPROACH**

Eminent domain, 36:10

## INDEX

### **INCOME TAX, EFFECT OF**

Damages for personal injuries, 6:10

### **INDEFINITE PERIOD OF TIME**

Breach of contract for wrongful discharge, 31:3

### **INDIVIDUALS**

Entities acts through, 7:7

### **INFANTS**

**Children and Minors** (this index)

### **INFERENCES**

**Presumptions** (this index)

### **INHERENTLY DANGEROUS ACTIVITIES**

Generally, 9:6

### **INQUIRY**

Constructive knowledge based on duty of, 3:7

### **INSANE DELUSIONS**

Wills, 34:12

### **INSTRUCTIONS OR DIRECTIONS**

Jury view, directions upon, 1:15

Products liability, 14:4

### **INSURANCE CONTRACTS, BAD FAITH BREACH OF**

Bad Faith Breach of Insurance Contracts, this index

### **INTENT**

Assault and battery, 20:3, 20:7, 20:8

Contracts, 24:2, 30:31

Definitions, 21:3

False imprisonment or arrest, 21:3, 21:4, 21:16

Interference with contractual obligations, 24:2

Trespass and trespassers, definition of intentionally, 18:2

Wills, intent of testator, 34:7

### **INTERFERENCE WITH CONTRACTUAL OBLIGATIONS**

Affirmative defenses, 24:6

Damages, 24:7

Elements of liability, 24:1

Improper, defined, 24:3

Intent, defined, 24:2

Interference, defined, 24:4

Nominal damages, 24:7

Terminable at will contracts, 24:5

Voidable contracts, 24:5

### **INTERPRETER**

Oath of, 1:22

## **INTERVENING CAUSES**

Negligence, 9:20

## **INTRODUCTORY REMARKS TO JURY PANEL**

Orientation of jury, 1:1

## **INTRUSION**

Invasion of privacy, 28:1 to 28:3

## **INVASION OF PRIVACY**

About the plaintiff, defined, 28:7

Affirmative defenses

consent, 28:15

privilege, 28:13

statute of limitations, 28:14

Appropriation, 28:4

Consent, 28:15

Damages, 28:16, 28:17

Elements of liability, 28:1

Exemplary or punitive damages, 28:17

False light, placing plaintiff in, 28:10

Intrusion, 28:1 to 28:3

Private facts, defined, 28:8

Privilege, 28:13

Public disclosure of private facts, 28:5

Public statement or disclosure, defined, 28:6

Statute of limitations, 28:14

Very offensive to a reasonable person, defined, 28:2, 28:9

## **INVESTIGATION DUTY**

Deceit based on fraud, 19:10, 19:11

## **INVITEES**

Premises liability, 12:3

## **JOINT VENTURES**

Definition, 7:4

Imputing negligence, 7:6

Vehicle, operation of, 7:5

## **JUDICIAL NOTICE**

Weight of evidence, 3:8

## **JUSTIFIABLE RELIANCE**

Defined, 14:24

## **JUVENILE DELINQUENCY**

Introductory remarks to jury panel, 40:1

Orientation of jury, 40:1, 40:2

Outline of procedures to jury, 40:2

Summary closing instruction, 40:3

## INDEX

### KNOWLEDGE

Notice or Knowledge (this index)

### LAST CLEAR CHANCE

Generally, 9:32

### LATENT DEFECTS

Premises liability, 12:9

### LATERAL SUPPORT

Landowner's right to, 12:14

### LESSORS AND LESSEES

Premises liability, 12:8 to 12:12

### LIBEL AND SLANDER

About the plaintiff, defined, 22:8

Absolute privilege, 22:15

Affirmative defenses

absolute privilege, 22:15

consent, 22:20

fair comment, 22:19

means of communication, privilege of, 22:18

meetings, privileged reports of, 22:17

qualified privilege, 22:16

statute of limitations, 22:21

substantial truth, 22:14

Consent, 22:20

Damages, 22:12 et seq., 22:23, 22:25

Definitions, 22:6

Exemplary or punitive damages, 22:25

Fair comment, 22:19

False, defined, 22:11

Meaning of statement, determination of, 22:9, 22:10

Means of communication, privilege of, 22:18

Meetings, privileged reports of, 22:17

Mitigation of damages, 22:24

Per quod

private persons, 22:5

public interest or public person, 22:2

Per se

private persons, 22:4

public interest or public person, 22:1

Private persons

per quod, 22:5

per se, 22:4

reckless disregard, 22:3

Public interest or public person

generally, 22:3

per quod, 22:2

**LIBEL AND SLANDER—Cont'd**

- Public interest or public person—Cont'd  
per se, 22:1
- Published, defined, 22:6
- Qualified privilege, 22:16
- Reckless disregard, defined, 22:3
- Repetition by third person, 22:22
- Special damages, 22:12
- Statute of limitations, 22:21
- Substantial truth, 22:14

**LICENSEES**

- Premises liability, 12:2

**LIFE EXPECTANCY**

- Damages, 5:5
- Malpractice by physicians and surgeons, 15:17

**LIFELONG FUTURE DAMAGES**

- Malpractice by physicians and surgeons, 15:17

**LIMITATIONS AND RESTRICTIONS**

- Eminent domain, limitations on damages to residue, 36:5
- False imprisonment or arrest, limitation on freedom of movement, 21:2

**LIMITATIONS OF TIME**

- Statute of Limitations** (this index)

**LIQUIDATED DAMAGES**

- Contracts, 30:40

**LOOKOUT DUTY**

- Motor vehicles and highway traffic, 11:1
- Negligence, 9:13

**LOSS OR DESTRUCTION OF EVIDENCE**

- Generally, 3:13

**LOST WILL**

- Presumption of revocation, 34:9

**MALICIOUS PROSECUTION**

- Affirmative defenses, 17:7, 17:8
- Attorney, advice of, 17:7, 17:8
- Damages, 17:9
- Elements of liability, 17:1 to 17:9
- Inference of lack of probable cause, 17:6
- Malice, 17:4, 17:5
- Probable cause, 17:2, 17:3, 17:6
- Proof of malice, 17:5
- Prosecuting attorney, affirmative defense of advice of, 17:8

**MALPRACTICE**

- Accountants, 15:25 to 15:30
- Affirmative defenses, consent of patient as, 15:8, 15:9
- Architects, 15:25 to 15:30
- Attorneys, 15:18 to 15:24
- Battery by physicians, 15:7 to 15:9
- Causation, real estate brokers, 15:27
- Consent of patient
  - operation or treatment without, 15:7
  - uninformed consent, 15:10 to 15:13
- Contributory negligence, 15:6, 15:24, 15:30
- Damage instructions, 15:14 to 15:17
- Definitions, 15:21, 15:24, 15:26, 15:30
- Implied warranties, 15:4, 15:22, 15:28
- Lifelong future damages, determining, 15:17
- Mistake of judgment, 15:4, 15:22, 15:28
- Non-specialists, 15:2
- Physicians and surgeons
  - affirmative defenses, consent of patient as, 15:8, 15:9
  - battery by physicians, 15:7 to 15:9
  - consent of patient
    - operation or treatment without, 15:7
    - uninformed consent, 15:10 to 15:13
  - contributory negligence of patient, 15:6
  - damage instructions, 15:14 to 15:17
  - definitions, 15:12
  - elements of liability, generally, 15:1
  - implied warranty of care, 15:4
  - life expectancy, 15:17
  - lifelong future damages, determining, 15:17
  - mistake of judgment, 15:4
  - non-specialists, 15:2
  - present value of future damages, determining, 15:16
  - referral of patient to another physician, 15:5
  - specialists, negligence of, generally, 15:3
  - special verdicts, 15:14, 15:15
  - warranty of care, 15:4
- Present value of future damages, determining, 15:16
- Referral of client to another professional, 15:23, 15:29
- Referral of patient to another physician, 15:5
- Specialists, negligence of, generally, 15:3
- Special verdicts, 15:14, 15:15
- Transactional malpractice defined, 15:27
- Uninformed consent of patient, 15:10 to 15:13
- Warranty of care, 15:4
- Warranty of success, 15:22, 15:28

**MANDATORY INSTRUCTION**

Discharge of jury, 1:18

**MANUFACTURERS**

**Products Liability** (this index)

**MARKET VALUE**

Eminent domain, 36:6

Property damages, 6:11

**MATERIAL FACT**

Defined, 19:4

**MEANS OF COMMUNICATION**

Privilege of, 22:18

**MEETINGS**

Privileged reports of, 22:17

**MENTAL HEALTH OR CONDITION**

Contracts, 30:22

Danger to self or others, defined, 35:5

Definitions, 35:3, 35:4

Expert witnesses, 35:5

Gravely disabled, defined, 35:4

Special verdicts, 35:1, 35:2, 35:6, 35:7

Statement of case, 35:1, 35:2

**MERCHANTABILITY**

Warranty of, 14:10, 14:11

**MINORS**

**Children and Minors** (this index)

**MISREPRESENTATIONS**

**Deceit and Fraud** (this index)

**MISTAKE**

Malpractice, 15:4, 15:22, 15:28

**MISUSE OF PRODUCT**

Products liability, 14:27

**MITIGATION OF DAMAGES**

Generally, 5:2

Libel and slander, 22:24

Wrongful discharge, 31:8

**MODIFICATION OR CHANGE**

Implied warranties, modification of, 14:16

**MORTALITY TABLES**

Damages, 5:5

## INDEX

### MOTOR VEHICLES AND HIGHWAY TRAFFIC

- Alcohol or drugs, driving under the influence of, 11:14
- Bicycle operator, duty of care, 11:3
- Brake or equipment failure, 11:13
- Crosswalk, pedestrian in, 11:4
- DUI, 11:14
- Family car doctrine, 11:15
- Handicapped drivers, duty of care, 11:6
- Head of household, 11:16
- Lookout duty, 11:1
- Minor operators, duty of care, 11:5
- Obedience to law, right to assume, 11:9
- Pedestrians, 11:3, 11:4
- Presumptions
  - control, presumption of, 11:18
  - rear-end collision, presumption of negligence from, 11:12
- Rear-end collision, 11:12
- Right of way, duty of persons having, 11:2, 11:3
- Speed of vehicle, duty of care, 11:8
- Unlicensed drivers, duty of care, 11:7
- Vicarious liability
  - family car doctrine, 11:15
  - head of household, 11:16
  - household or family defined, 11:17
  - imputation of driver's negligence to owner, 11:18
  - presumption of control, 11:18
- Wrong side of road, driving on, 11:10, 11:11

### MULTIPLE PARTIES

- Damages, multiple recovery, 6:14
- Products liability, 14:31 to 14:31B, 14:32 to 14:33B
- Several liability, 9:29 et seq.
- Verdict forms, generally, 4:7

### NEGLECT

- Dependency and Neglect** (this index)

### NEGLIGENCE

- Affirmative defenses, 9:24
- Automobiles. **Motor Vehicles and Highway Traffic** (this index)
- Causation
  - concurrent causes, 9:19, 9:20
  - definition, 9:18
  - foreseeability, 9:21
  - intervening causes, 9:20
- Children
  - standard of care, 9:9
- Comparative Negligence** (this index)
- Concurrent causes, 9:19, 9:20

**NEGLIGENCE—Cont'd**

Contributory negligence

imputation of, 9:25

last clear chance, 9:32

malpractice, 15:6, 15:24

physicians and surgeons, 15:6

wrongful death, 10:1, 10:2

Definitions

generally, 9:6

causation, 9:18

inherently dangerous activities, 9:7

Designated non-party, 9:29 et seq.

Drivers and driving. **Motor Vehicles and Highway Traffic** (this index)

Elements of liability, 9:1 to 9:4

Emotional distress, elements of liability, 9:2

Financial loss, misrepresentations causing, 9:4, 9:5

Foreseeability, 9:21

Imputation of contributory negligence, 9:25

Inherently dangerous activities, 9:7

Intervening causes, 9:20

Last clear chance, 9:32

Looking but failing to see as, 9:13

Misrepresentations causing loss or harm, elements of liability, 9:3

**Motor Vehicles and Highway Traffic** (this index)

Multiple parties

several liability, 9:29 et seq.

Negligence per se, 9:14

Parent and child, 9:25

**Premises Liability** (this index)

Presumptions, 9:12, 9:17

**Products Liability** (this index)

Reasonable care defined, 9:8

Rescue and rescuers, 9:32

Res ipsa loquitur, 9:17, 14:21

Several liability, 9:29 et seq.

Special verdicts

comparative negligence, 9:26A et seq.

several liability, 9:29A, 9:29B

Statement of case to be determined, 2:6

Statute or ordinance, 9:14 to 9:16

Sudden emergency, 9:11

Ultrahazardous activities resulting in strict liability, 9:7A

Unavoidable accident, 9:32

Volunteers, 9:10

Willful and wanton negligence, 9:30

**NEGLIGENCE PER SE**

Generally, 9:14

## INDEX

### **NOMINAL DAMAGES**

- Assault and battery, 20:4, 20:9
- Contracts, 30:41
- False imprisonment or arrest, 21:5
- Interference with contractual obligations, 24:7
- Trespass to land, 18:4

### **NON-REDUCTION**

- Damages for personal injuries, 6:7

### **NON-SPECIALISTS**

- Malpractice by physicians and surgeons, 15:2

### **NOTEBOOKS OR NOTE TAKING**

- Orientation of jury, 1:8, 1:9

### **NOTICE OR KNOWLEDGE**

- Products liability
  - affirmative defenses, knowing use of product, 14:28
  - breach of warranty, notice of, 14:15

### **NOVATION**

- Contracts, 30:29

### **NUMBER OF WITNESSES**

- Evidence, 3:12

### **OATHS**

- Bailiff, oath of, 1:23
- Interpreter, oath of, 1:22
- Jurors, oath of, 1:20
- Retirement of jury, oath of bailiff on, 1:23
- Voir dire, oath on, 1:18
- Witnesses, oath of, 1:21

### **OBEDIENCE TO LAW**

- Motor vehicles and highway traffic, right to assume obedience to law, 11:9

### **OPINION**

- Deceit based on fraud, statements of opinion, 19:15
- Expert witnesses, opinions of
  - generally, 3:15
  - mental health, 35:5

### **ORDINARY MEANING**

- Contracts, interpretation, 30:33

### **ORIENTATION OF JURY**

- Admonitions to jury, 1:10
- Conduct of jurors during trial, 1:4, 1:5
- Explanation of voir dire, 1:2
- General instructions, 1:1 to 1:10
- Introductory remarks to jury panel, 1:1

**ORIENTATION OF JURY—Cont'd**

- Juvenile delinquency, 40:1, 40:2
- Notebooks of jurors, 1:9
- Note-taking by jurors, 1:8
- Outline of trial procedures to jury, 1:7
- Pretrial publicity, 1:6
- Recess, admonitions to jury at, 1:10
- Remarks on voir dire, 1:3
- Voir dire, explanation and remarks on, 1:2, 1:3

**OUTLINE OF TRIAL PROCEDURES TO JURY**

- Orientation of jury, 1:7

**OUTSIDE INFORMATION**

- Prohibition of, 1:5

**OWNERS OR OCCUPANTS**

- Premises Liability** (this index)

**PARENT AND CHILD**

- Damages for personal injuries, 6:3
- Imputation of parents' negligence imputed to children, 9:25

**PARTICULAR PURPOSE ONLY**

- Admission of evidence for, 1:11

**PARTNERSHIPS**

- Definition, 7:3

**PEDESTRIANS**

- Motor vehicles and highway traffic, 11:3, 11:4

**PERSONAL INJURIES, DAMAGES FOR**

- Adults, 6:1
- Aggravation of pre-existing condition, 6:8
- Amount of damages, 6:1A, 6:1B
- Answer to special interrogatories, 6:1B
- Consortium, loss of, 6:5, 6:6
- Earnings loss, 6:4
- Income tax, effect of, 6:10
- Minor children, 6:2 to 6:4
- Non-reduction, 6:7
- Parent's damages, 6:3
- Pre-existing condition, aggravation of, 6:8
- Thin skull doctrine, 6:7
- Unrelated second event, 6:9

**PERSONAL PROPERTY**

- Damages for injury to, 6:11 to 6:13
- Defense or recapture of, 20:16, 20:17
- Loss of use, 6:13
- Market value, difference in, 6:11

## INDEX

### PERSONAL PROPERTY—Cont'd

Repair cost, 6:12

### PHYSICIANS AND SURGEONS, MALPRACTICE BY

Affirmative defenses, consent of patient as, 15:8, 15:9

Battery by physicians, 15:7 to 15:9

Consent of patient

operation or treatment without, 15:7

uninformed consent, 15:10 to 15:13

Contributory negligence of patient, 15:6

Damage instructions, 15:14 to 15:17

Definitions, 15:12

Elements of liability, generally, 15:1

Implied warranty of care, 15:4

Life expectancy, 15:17

Lifelong future damages, determining, 15:17

Mistake of judgment, 15:4

Non-specialists, 15:2

Present value of future damages, determining, 15:16

Referral of patient to another physician, 15:5

Specialists, negligence of, generally, 15:3

Special verdicts, 15:14, 15:15

Warranty of care, 15:4

### PRE-EXISTING CONDITION

Aggravation of, 6:8

### PREJUDICE

Evidence, 3:14

### PREMISES LIABILITY

Amusement park devices, 12:13

Attractive nuisance doctrine, 12:4, 12:5

Children, duty as to, 12:4, 12:5

Implied warranty of fitness, 12:8

Invitee, duty as to, 12:3

Latent defects, 12:9

Lateral support, landowner's right to, 12:14

Lessor's duty of care, 12:8 to 12:12

Licensee, duty as to, 12:2

Negligent choice of route, public places, 12:17

Owner or occupants's duty of care, generally, 12:1 et seq.

Presumption of competency of child, 12:5

Public places or ways

generally, 12:15 to 12:17

choice of route, negligence by user, 12:17

duty of care by user of public way, 12:16

Public use, premises leased for, 12:10

Repairs of premises, 12:11, 12:12

Ski lifts, 12:13

**PREMISES LIABILITY—Cont'd**

- Sovereign immunity, 12:15
- Subjacent support, landowner's right to, 12:14
- Trespassers, duty as to, 12:1

**PREPONDERANCE OF EVIDENCE**

- Defined, 3:1
- Number of witness, 3:12

**PRESENT VALUE OF FUTURE DAMAGES**

- Determining, 15:16

**PRESUMPTIONS**

- Generally, 3:6, 3:7
- Bailors and bailees, presumption of negligence, 16:6
- Control, presumption of, 11:18
- Damages, inferences prohibited, 5:1
- Fifth Amendment privilege, inference arising from invocation of, 3:5A
- Happening of accident, presumption of negligence from, 9:12
- Malicious prosecution, inference of lack of probable cause, 17:6
- Motor vehicles and highway traffic
  - control, presumption of, 11:18
  - rear-end collision, presumption of negligence from, 11:12
- Premises liability, competency of child, 12:5
- Products Liability** (this index)
- Rear-end collision, presumption of negligence from, 11:12
- Rebuttable presumptions, permissible inference arising from, 3:5
- Res ipsa loquitur, 9:17
- Ten-year use of product, products liability, 14:5B
- Wills, undue influence, 34:16, 34:17

**PRETRIAL PUBLICITY**

- Orientation of jury, 1:6

**PRIVACY**

- Invasion of Privacy** (this index)

**PRIVATE FACTS**

- Defined, 28:8

**PRIVATE PERSONS**

- Libel and slander, 22:4 to 22:6

**PRIVILEGE**

- Abuse of privilege to arrest, 21:19
- Common law privilege to detain for investigation, 21:8
- Defense of person privilege, 21:9
- Invasion of privacy, 28:13
- Libel and slander, absolute privilege, 22:15
- Qualified privilege, libel and slander, 22:16
- Statutory privilege to detain for investigation, 21:7

## PROBABLE CAUSE

- False imprisonment or arrest, 21:13
- Malicious prosecution, 17:6

## PRODUCTS LIABILITY

### Affirmative defenses

- assumption of risk, 14:25, 14:28
- comparative fault, 14:28 to 14:33B
- knowing use of product, 14:25, 14:28
- negligence, comparative fault based on, 14:29
- special verdict forms, 14:30B to 14:33B
- unavoidably unsafe product, risk of, 14:26

### Assumption of risk, 14:25

### Beverage, injury from, 14:20, 14:21

### Comparative fault, 14:28 to 14:33B

### Damage alone as proof of defect, 14:7

### Definitions, 14:2, 14:3, 14:23, 14:24

### Evidence of defect, damage alone as, 14:7

### Exclusion of implied warranties, 14:16

### Express warranties, 14:8, 14:9

### Fitness for particular purpose, warranty of, 14:13, 14:14

### Food

#### injury from, 14:20, 14:21

#### warranty of wholesomeness of, 14:12

### Governmental standards, compliance with, 14:5, 14:5A

### Implied warranties

#### generally, 14:10 to 14:16

#### creation and exclusion or modification, 14:16

#### fitness for a particular purpose, 14:13, 14:14

#### merchantability, 14:10, 14:11

#### wholesomeness of food, 14:12

### Instructions, 14:4

### Justifiable reliance, 14:24

### Knowledge. Notice or knowledge, infra

### Merchantability, warranty of, 14:10, 14:11

### Misrepresented product, strict liability of seller for, 14:22 to 14:24

### Misuse of product, 14:27

### Modification of implied warranties, 14:16

### Negligence, liability for, generally, 14:17 to 14:21

### Notice or knowledge

#### affirmative defenses, knowing use of product, 14:28

#### breach of warranty, notice of, 14:15

### Parts obtained from other sources, duty as to, 14:18

### Presumptions

#### governmental standards, 14:5, 14:5A

#### ten-year use of product, 14:5B

### Res ipsa loquitur, injury from food or beverage in sealed container, 14:21

### Sealed container, injury from food or beverage in, 14:20, 14:21

**PRODUCTS LIABILITY—Cont'd**

Special verdict forms, 14:30B to 14:33B

State-of-the-art, 14:6

Strict liability of seller

defective products, 14:1 to 14:7

misrepresented product, 14:22 to 14:24

Ten-year use of product, presumptions, 14:5B

Unavoidably unsafe product, risk of, 14:26

Uniform commercial code, liability for breach of warranty under, 14:8 to 14:16,  
14:25, 14:26

Warnings, 14:4, 14:19

Warranty, liability for breach of

generally, 14:8 to 14:16, 14:25, 14:26

affirmative defenses, 14:25, 14:26

express warranties, 14:8, 14:9

implied warranties, *supra*

notice of breach of, 14:15

Wholesomeness of food, warranty of, 14:12

**PROFESSIONAL LIABILITY**

**Malpractice** (this index)

**PROFESSIONALS IN OTHER THAN A HEALING ART**

Defined, 15:21, 15:26

**PROLONGED DELIBERATIONS OF JURY**

Generally, 4:3

**PROOF**

**Evidence** (this index)

**PROPERTY**

**Personal Property** (this index)

**Real Property** (this index)

**PROSECUTING ATTORNEY**

Malicious prosecution, affirmative defense of advice of prosecuting attorney,  
17:8

**PUBLIC DISCLOSURE OF PRIVATE FACTS**

Invasion of privacy, 28:5

**PUBLIC IMPACT**

Consumer Protection Act, significant impact on public defined, 29:4

**PUBLIC INTEREST OR PUBLIC PERSON**

Libel and slander, 22:1 to 22:3

**PUBLICITY**

Orientation of jury, 1:6

**PUBLIC PLACES**

Premises liability, 12:15 to 12:17

**PUBLIC-POLICY**

Wrongful discharge, claims involving public-policy, 31:12, 31:14, 31:16

**PUBLIC STATEMENT OR DISCLOSURE**

Defined, 28:6

**PUBLIC USE**

Premises leased for, 12:10

**PUBLISHED**

Defined, 22:6

**PUFFING**

Deceit based on fraud, 19:15

**PUNITIVE DAMAGES**

Generally, 5:4

Bad faith breach of insurance contract, 25:8

Invasion of privacy, 28:17

Libel and slander, 22:25

Verdict forms, 4:5

**QUALIFIED PRIVILEGE**

Libel and slander, affirmative defenses, 22:16

**QUESTIONS**

Deliberations of jury, questions during, 4:2A

Evidence, questions to witnesses, 1:16, 1:17

**REAL ESTATE BROKERS**

Transactional malpractice, 15:27

**REAL PROPERTY**

Actual or nominal damages for injury to, 6:13A

Assault and battery, defense of real property as affirmative defense, 20:15

**REAR-END COLLISION**

Motor vehicles and highway traffic, 11:12

**REASONABLE CARE**

Defined, 9:8

**REASONABLE DOUBT**

Defined, 3:3

**REBUTTABLE STATUTORY PRESUMPTIONS**

Generally, 3:6

**RECAPTURE OF PERSONAL PROPERTY**

Affirmative defense to assault and battery, 20:17

**RECESS**

Admonitions to jury at, 1:10

**RECKLESS DISREGARD**

Defined, 22:3

**RECKLESSLY OR WITH INTENT**

Defined, 23:3

**REFERRALS**

Malpractice, liability for, 15:5, 15:23, 15:29

**RELIANCE**

Deceit based on fraud, 19:7 to 19:11

Defined, 19:7

**REPAIRS OF PREMISES**

Premises liability, 12:11, 12:12

**REPETITION BY THIRD PERSON**

Libel and slander, 22:22

**REPORT OF COMMISSIONERS**

Eminent domain, 36:11

**RESCISSION OR CANCELLATION**

Contracts, 30:27

**RESCUE AND RESCUERS**

Negligence, 9:32

**RESIDUE**

Eminent domain, damages and benefits to residue, 36:4, 36:5

**RES IPSA LOQUITUR**

Generally, 9:17

Products liability, injury from food or beverage in sealed container, 14:21

**RESPONDEAT SUPERIOR**

Agency

Generally, 8:1 et seq.

Actual authority, 8:9A

Corporate officer or employee, 8:23

Defined, 8:1

Disclosed principal, 8:2

Employer and employee, 8:4

Express authority, 8:9B

Implied authority, 8:11

Independent contractor, 8:5

Liability, 8:18 et seq.

both parties sued, scope of authority or relationship, 8:18, 8:19, 8:22, 8:23

employer sued, scope of authority or relationship, 8:24, 8:25

principal sued, scope of authority or relationship, 8:20, 8:21

Loaned employee, 8:6, 8:7

Scope of authority defined, 8:9, 8:13

Scope of employment defined, 8:8

Scope of employment defined, 8:8

Termination of authority, 8:16, 8:17

Undisclosed principal, 8:3

## INDEX

### **RESTRICTIONS AND LIMITATIONS**

Eminent domain, limitations on damages to residue, 36:5

False imprisonment or arrest, limitation on freedom of movement, 21:2

### **RETALIATION, CLAIMS INVOLVING**

Wrongful discharge, 31:13

### **RETIREMENT OF JURY**

Deliberations, generally, 4:2

Oath of bailiff on, 1:23

### **RETURN OF PROPERTY**

Bailors and bailees, 16:6

### **REVOCAION OF WILL**

Burning, tearing, canceling, obliterating or destroying, 34:8, 34:9

Lost will, presumption of revocation, 34:9

Presumption of, 34:9

### **RIGHT OF WAY**

Duty of persons having, 11:2, 11:3

### **RULE 301**

Presumptions under, 3:5

### **SAFETY BELT**

Nonuse of, 5:3

### **SALARY FOR FIXED TERM**

Employment contract providing for, 31:2

### **SEALED CONTAINER**

Injury from food or beverage in, 14:20, 14:21

### **SEALED VERDICTS**

Generally, 4:14

### **SECTION 13-21-202, C.R.S.**

Wrongful death action under, 10:3

### **SELF-DEFENSE**

Affirmative defenses

assault and battery, 20:12, 20:13

false imprisonment or arrest, 21:9

Assault and battery, 20:12, 20:13

False imprisonment or arrest, 21:9

### **SELF-PROVED WILLS**

Generally, 34:5

### **SEVERAL LIABILITY**

Negligence, 9:29 et seq.

### **SEVERE EMOTIONAL DISTRESS**

Defined, 23:4

**SHIFTING BURDEN OF PROOF**

Statutory presumptions, 3:6

**SKI LIFTS**

Premises liability, 12:13

**SLANDER**

**Libel and Slander** (this index)

**SOVEREIGN IMMUNITY**

Premises liability, 12:15

**SPECIAL DAMAGES**

Contracts, 30:39

Libel and slander, 22:12

**SPECIAL INTERROGATORIES**

Damages for personal injuries, 6:1A, 6:1B

**SPECIALISTS**

Negligence of, generally, 15:3

**SPECIAL VERDICTS**

Generally, 4:15, 4:16

Comparative negligence, 9:26A et seq.

Malpractice by physicians and surgeons, 15:14, 15:15

Mental health, 35:1, 35:2, 35:6, 35:7

Negligence

comparative negligence, 9:26A et seq.

several liability, 9:29A, 9:29B

Products liability, 14:30A to 14:33B

Several liability, 9:29A, 9:29B

**SPECULATION**

Evidence, 3:4

**SPEED**

Motor vehicles and highway traffic, 11:8

**SPOUSE**

Consortium. **Consortium, Loss of** (this index)

**STATEMENT OF CASE TO BE DETERMINED**

Admitted liability, 2:4

Counterclaims, 2:1, 2:2

Damages only in issue, 2:5, 2:6

Directed verdict as to liability, 2:5, 2:6

Liability in issue, 2:1 to 2:3

Negligence, 2:6

Third party complaint, 2:3

**STATE-OF-THE-ART**

Products liability, 14:6

## INDEX

### STATUTE OF LIMITATIONS

- Affirmative defenses
  - invasion of privacy, 28:14
  - libel and slander, 22:21
- Contracts, 30:26
- Invasion of privacy, 28:14
- Libel and slander, 22:21

### STATUTE OR ORDINANCE

- False imprisonment or arrest, statutory privilege to detain for investigation, 21:7
- Insurance contracts, statutory violation, 25:4, 25:10
- Limitations. **Statute of Limitations** (this index)
- Negligence, 9:14 to 9:16
- Presumptions, 3:6

### STIPULATIONS

- Admissions of fact, 1:13
- Testimony of witness, stipulations concerning, 1:13
- Weight of evidence, 3:8

### STRICKEN EVIDENCE

- Generally, 1:12

### STRICT LIABILITY

- Defective products, 14:1 to 14:7
- Misrepresented product, 14:22 to 14:24
- Ultrahazardous activities, 9:7A

### SUBJACENT SUPPORT

- Landowner's right to, 12:14

### SUBSTANTIAL TRUTH

- Libel and slander, affirmative defenses, 22:14

### SUDDEN EMERGENCY

- Negligence, 9:11

### SUMMARY CLOSING INSTRUCTION

- Deliberations of jury, 4:1
- Juvenile delinquency, 40:3

### SYMPATHY

- Evidence, 3:14

### TECHNICAL WORDS

- Contracts, use of technical words, 30:34

### TEN-YEAR USE OF PRODUCT

- Products liability, presumptions, 14:5B

### TERMINATION

- Wrongful discharge, termination procedures of employer, 31:4

**TESTAMENTARY CAPACITY**

Wills, 34:10, 34:11

**TESTIMONY**

Witnesses (this index)

**THIN SKULL DOCTRINE**

Damages for personal injuries, 6:7

**THIRD PARTIES**

Bailor's liability to, 16:2

Insurance contracts, third-party claim cases, 25:1

Statement of case to be determined, third party complaint, 2:3

Verdict forms, third party plaintiff or defendant, 4:10, 4:11

**TRANSCRIPT**

Testimony read from, 3:11

**TRANSFERRED INTENT**

Assault and battery, 20:8

**TRESPASS AND TRESPASSERS**

Actual or nominal damages, 18:4

Consent, 18:3

Elements of liability, 18:1

Intentionally defined, 18:2

Premises liability, 12:1

**ULTERIOR PURPOSE**

Abuse of process, 17:12

**ULTRAHAZARDOUS ACTIVITIES**

Strict liability, 9:7A

**UNAVOIDABLE ACCIDENT**

Negligence, 9:32

**UNAVOIDABLY UNSAFE PRODUCT**

Products liability, 14:26

**UNDUE INFLUENCE**

Contracts, 30:19

Wills, 34:14 et seq.

**UNIFORM COMMERCIAL CODE**

Liability for breach of warranty under, 14:8 to 14:16, 14:25, 14:26

**UNINFORMED CONSENT**

Malpractice by physicians and surgeons, 15:10 to 15:13

**UNLICENSED DRIVERS**

Motor vehicles and highway traffic, 11:7

**UNREASONABLE DELAY OR DENIAL**

Defined, 25:5

## INDEX

### VALID WARRANT

False imprisonment or arrest, 21:17

### VALUATION

Eminent domain, 36:7

### VALUE OF PROPERTY TAKEN

Eminent domain, 36:3

### VERDICTS

Counterclaims, 4:8, 4:9

Cross-claimant, 4:12, 4:13

Directed verdict, 2:5, 2:6

Eminent domain, 36:11

Exemplary or punitive damages, 4:5

Forms

generally, 4:4 to 4:13

counterclaims, 4:8, 4:9

cross-claimant, 4:12, 4:13

exemplary or punitive damages, 4:5

Model Unified Verdict Form, 4:20

multiple parties, 4:7

special verdicts or interrogatories, 4:16, 14:30A et seq.

third party plaintiff or defendant, 4:10, 4:11

Multiple parties, 4:7

Sealed verdicts, 4:14

Special verdicts or interrogatories, 4:15, 4:16, 14:30A et seq.

Third party plaintiff or defendant, 4:10, 4:11

Wills, 34:20, 34:21

### VERY OFFENSIVE TO A REASONABLE PERSON

Defined, 28:2, 28:9

### VICARIOUS LIABILITY

Family car doctrine, 11:15

Head of household, 11:16

Household or family defined, 11:17

Imputation of driver's negligence to owner, 11:18

Motor vehicles and highway traffic

family car doctrine, 11:15

head of household, 11:16

household or family defined, 11:17

imputation of driver's negligence to owner, 11:18

presumption of control, 11:18

Presumption of control, 11:18

### VIEW BY JURY

Directions upon, 1:15

### VOIR DIRE

Explanation and remarks on, 1:2, 1:3

**VOIR DIRE—Cont'd**

Oath on, 1:19

**VOLUNTEERS**

Negligence, 9:10

**WAIVER**

Affirmative defenses, waiver by plaintiff before completion of performance,  
19:16

Contracts, 30:25

**WARNINGS OR WARNING DUTY**

Bailors and bailees, 16:3

Products liability, 14:4, 14:19

**WARRANTIES**

Malpractice by other than physicians and surgeons, 15:22, 15:28

Malpractice by physicians and surgeons, 15:4

**Products Liability** (this index)

**WEIGHT OF EVIDENCE**

Generally, 3:8 to 3:18

**WHOLESOMENESS OF FOOD**

Warranty of, 14:12

**WILLFUL AND WANTON NEGLIGENCE**

Generally, 9:30

**WILLS**

Attestation by witnesses, effect of, 34:13

Burden of proof on issue of sound mind, 34:10

Burning, tearing, canceling, obliterating or destroying, 34:8, 34:9

Confidential relationship, 34:16 et seq.

Conscious presence defined, 34:3

Fiduciary relationship, 34:19

Holographic wills, 34:6

Insane delusion, 34:12

Intent of testator, 34:7

Lost will, presumption of revocation, 34:9

Proof of validly executed will, 34:2, 34:5 to 34:6

Revocation of will

burning, tearing, canceling, obliterating or destroying, 34:8, 34:9

lost will, presumption of revocation, 34:9

presumption of, 34:9

Self-proved wills, 34:5

Statement of case, 34:1

Testamentary capacity, 34:10, 34:11

Undue influence, 34:14 et seq.

Verdict forms, 34:20, 34:21

Witness having interest under will, 34:4

## INDEX

### WITNESSES

- Oath of, 1:21
- Questions to, 1:16, 1:17
- Stipulations as to testimony of, 1:14
- Wills, witnesses having interest under, 34:4

### WORDS ALONE

- Assault and battery, words alone as justification for, 20:10

### WORDS AND PHRASES

- About the plaintiff, 22:8, 28:7
- Actual damages, 22:13
- Apprehension, 20:2
- Arrest, 21:12
- At-will employment, 31:5
- Bailors and bailees, 16:1, 16:3, 16:4
- Causation, 9:18
- Concealment, 19:6
- Confidential relationship, 34:18
- Conscious presence, 34:3
- Consortium, loss of, 6:6
- Constructive discharge, 31:9
- Contributory negligence of client, 15:24
- Contributory negligence of patient, 15:6
- Defamatory, 22:7
- Defective, 14:3
- Driving under the influence, 11:14
- Duties of fiduciary, 26:4
- Emancipation, of minor, 7:2
- Evidence, 3:1 to 3:3, 3:5, 3:6, 3:8, 3:9
- Express warranty, 14:9
- Extreme and outrageous conduct, 23:2
- False, 22:11
- False information, 28:11
- False light, 28:12
- False representation, 19:3, 19:7
- Fiduciary relationship, 26:2, 34:19
- Financial loss, misrepresentations causing, 9:5
- Fitness for particular purpose, warranty of, 14:14
- Fresh pursuit, 21:14
- Good or just cause, 31:6
- Gravely disabled, 35:4
- Head of household, 11:16
- Household or family, 11:17
- Insane delusion, 34:12
- Intent, 21:3
- Intentional and substantial interference, conversion, 32:2
- Intentional intrusion, 28:3

**WORDS AND PHRASES—Cont'd**

Intentionally, civil theft, 32:5  
Intent of testator, 34:7  
Intent to place another in apprehension, 20:3  
Joint venture, 7:4  
Joint venture in operation of vehicle, 7:5  
Justifiable reliance, 14:24  
Justifiable reliance, investigation duty, 19:10  
Justifiable reliance, nondisclosure or concealment, 19:9  
Justifiable reliance on false representation, 19:8  
Knowingly, civil theft, 32:5  
Manufacturer, 14:2  
Material fact, 19:4  
Mental illness, person with, 35:3  
Merchantability, warranty of, 14:11  
Minor's right to sue or defend, 7:1  
Misrepresentation of material fact, 14:23  
Negligence, 9:6, 9:7, 16:4  
Non-specialists, 15:2  
Partnerships, 7:3  
Private facts, 28:8  
Probable cause, 17:2, 21:13  
Professionals in other than healing arts, 15:21, 15:26  
Public statement or disclosure, 28:6  
Published, 22:6  
Reasonable care, 9:8  
Reckless disregard, 22:3  
Recklessly or with intent, 23:3  
Reliance, 19:7  
Restriction of freedom of movement, 21:2  
Severe emotional distress, 23:4  
Special damages, 22:12  
Substantial risk, 15:12  
Testamentary capacity, 34:11  
Transactional malpractice defined, 15:27  
Ulterior purpose, 17:12  
Undue influence, 34:14  
Unlawful goal, 27:3  
Unlawful means, 27:2  
Unreasonable conduct or position, 25:3  
Unreasonable delay or denial, 25:5  
Unreasonably dangerous, 14:3  
Very offensive to a reasonable person, 28:2, 28:9  
Wholesomeness of food, warranty of, 14:12

**WRONGFUL DEATH**

Assault and battery, affirmative defenses, 20:13  
Children, 10:4

## INDEX

### **WRONGFUL DEATH—Cont'd**

- Contributory negligence, 10:1, 10:2
- Decedent, contributory negligence of, 10:1
- Plaintiff, contributory negligence of, 10:2
- Section 13-21-202, C.R.S., action under, 10:3

### **WRONGFUL DISCHARGE**

- Affirmative defense, after acquired evidence of fraud or other misconduct, 31:11, 31:16
- At-will employment, defined, 31:5
- Constructive discharge, 31:9, 31:10
- Damages, 31:7, 31:8, 31:15
- Definite period of time, breach of contract for, 31:1
- Fixed term salary, contract providing for, 31:2
- General damages, 31:7
- Good or just cause, defined, 31:6
- Indefinite period of time, breach of contract for, 31:3
- Public-policy, claims involving, 31:12, 31:14, 31:16
- Retaliation, claims involving, 31:13
- Salary for fixed term, contract providing for, 31:2
- Termination procedures of employer, breach based on violation of, 31:4

### **WRONG SIDE OF ROAD, DRIVING ON**

- Motor vehicles and highway traffic, 11:10, 11:11





ISBN 978-1-539-29352-1



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